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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS.

VOL. II.

CONTAINING CASES IN 1844 & '45.

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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. STEVENSON ARCHER, Chief Judge.
Hon. JOHN STEPHEN, Judge.
Hon. THOMAS BEALE DORSEY, Judge.
Hon. E. F. CHAMBERS, Judge.
Hon. ARA SPENCE, Judge.
Hon. WILLIAM B. STONE, Judge.
Hon. SAMUEL M. SEMMES, Judge.
Hon. ALEXANDER C. MAGRUDER, Judge.
Hon. ROBERT N. MARTIN, Judge.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

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Hon. JOHN STEPHEN, Chief Judge.
Hon. WILLIAM B. STONE, Chief Judge.
Hon. ALEXANDER C. MAGRUDER, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. CLEMENT DORSEY, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne and Talbot counties.*

Hon. E. F. CHAMBERS, Chief Judge.
Hon. PHILEMON B. HOPPER, Associate Judge.
Hon. JOHN B. ECCLESTON, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel, Montgomery and Carroll* counties.

Hon. THOMAS BEALE DORSEY, Chief Judge.

Hon. THOMAS H. WILKINSON, Associate Judge.

Hon. NICHOLAS BREWER, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester* counties.

Hon. ARA SPENCE, Chief Judge.

Hon. WILLIAM TINGLE, Associate Judge.

Hon. BRICE J. GOLDSBOROUGH, do.

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Hon. SAMUEL M. SEMMES, Chief Judge.

Hon. ROBERT N. MARTIN, Chief Judge.

Hon. RICHARD H. MARSHALL, Associate Judge.

Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford* counties.

Hon. STEVENSON ARCHER, Chief Judge.

Hon. RICHARD B. MAGRUDER, Associate Judge.

Hon. JOHN PURVIANCE, Associate Judge.

Hon. JOHN C. LE GRAND, Associate Judge.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. ALEXANDER NISBET, Associate Judge.

Hon. W. G. D. WORTHINGTON, do.

ATTORNEY GENERAL.

JOSIAH BAYLEY, Esquire.

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CASES
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MARYLAND.

JUNE TERM, 1844.

RICHARD W. ISAAC AND WIFE'S LESSEE vs. CALEB CLARKE.
June, 1844.

Where it appeared that the defendant, in an action of ejectment, had conveyed his lands to R, who had died intestate, and that one of the jurors empaneled to try the cause was his brother and heir-at-law, the fact of the conveyance being unknown to the plaintiff when the jury was sworn, the court will permit the juror to execute a deed of re-conveyance and release to the defendant, for the purpose of restoring his competency.

A sale of land made by a sheriff, under execution, to his own agent, is not necessarily void at law. It is voidable for fraud in fact.

The jury alone is the proper tribunal to pronounce on the fact of fraud; and the circumstance that the purchaser is an agent of the sheriff will be regarded with much suspicion.

A plaintiff in ejectment cannot offer in evidence a record of the proceedings upon the bill of the defendant in Chancery against him, which bill had been dismissed for want of due prosecution upon the motion of the plaintiff, for the purpose of precluding the defendant from questioning the plaintiff's title at law, though the object of the bill was to vacate such title.

A bill dismissed under a rule for further proceedings, does not preclude the complainant from using any defence at law which he might otherwise have used.

The general rule is that a party consenting to hold as lessee, cannot afterwards deny the title of his acknowledged landlord.

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There are exceptions to this rule; but they do not rest on the fact that the acknowledgment was made by the tenant subsequent to his coming into possession, or that he originally had possession under another title.

The circumstances of deception, mistake, or other grounds, which exempt a tenant from the influence of the rule, apply as well to the case of admissions after his possession commenced, as before.

Where a party is in possession, and enters into an agreement with another claiming the land, to become his tenant, he is within the general rule, which forbids the tenant from questioning the landlord's title. A relation thus created does not, *per se*, constitute one of the exceptions to that rule.

The court cannot say that a description in a deed for land is too vague, and the deed void for uncertainty, when the vagueness and uncertainty are not obvious from an inspection of the instrument.

A deed capable of a certain location is sufficiently certain in the description to pass title.

APPEAL from *Prince George's* County Court.

This was an action of ejectment, commenced on the 25th March, 1835, to recover all those tracts of land called "*Burgess' Delight*," "*Clarke's Fancy*," and "*Hickory Thicket*." The date of the demise was 1st January, 1835. The tenant appeared, pleaded not guilty, and took defence on warrant.

1ST EXCEPTION. During the trial of this cause, after the jury were empaneled, and before the case was argued to the jury, and before the several bills of exceptions taken in this case were signed by the court, it was discovered for the first time by the plaintiff's counsel, that the defendant, *Caleb Clarke*, had conveyed the lands in controversy to a certain *Richard Peach*, by deed bearing date the 13th November, 1829, and which is in the following words, to wit, &c.

And it was then proved that *Richard Peach* was dead and intestate, and that one of the jurors, to wit, *Samuel Peach*, was his brother and heir-at-law, and as such had an interest in the result of the suit, and it was contended by the plaintiff's counsel that the said *Samuel Peach* was on that account an incompetent juror to try this cause, and thereupon the plaintiff, by his counsel, having first satisfied the court that said deed to *Richard Peach* was unknown to them or the plaintiff when the said *Samuel* was sworn as a juror, prayed the court to withdraw the said juror, and to have a new jury empaneled to

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try the said cause, but the court refused said application, and permitted the said *Samuel* to execute a deed of re-conveyance and release of said lands to *Caleb Clarke*, for the purpose of restoring his competency as a juror, in open court, as follows, viz: &c.

And directed the trial of the said cause to proceed before the said jury thus empaneled; to which opinion of the court (STEPHEN, C. J. and DORSEY, C. J.) and their refusal to permit said juror to be withdrawn, the plaintiff excepted.

2ND EXCEPTION. At the trial of this cause, the plaintiff to maintain the issue joined on his part, offered in evidence to the jury the locations and explanations made by him upon the plats, and then read in evidence the patents of *Burgess' Delight* and *Hickory Thicket*, and proved that said tracts are properly located upon the plats, and that all those parts of said tracts which are included in the lines drawn upon the plats shaded yellow, were regularly conveyed by divers mesne conveyances to one *Walter S. Clarke*; and then read in evidence the record of a judgment recovered by *William Holmes* against the said *Walter S. Clarke*, at April term, 1814, of this court, and the record of a *fiat* on a *scire facias* on the said judgment of April term 1814, and also a transcript of the record of the Court of Appeals, which is as follows, to wit, &c.

This was the record of a *fieri facias* issued upon a judgment recovered by *William Holmes* against *Walter S. Clarke*, at April term, 1814, revived in 1821. The execution bore date the 5th December, 1822, and was followed by various writs of *venditioni exponas*, and return of a sale on the 17th June, 1826, to *Francis Belmear*, of a defined parcel of the lands mentioned in the declaration in this cause, and of a writ of *habere facias possessionem* awarded to said *F. B.*, which was affirmed upon appeal.

And it was admitted by the parties that the aforesaid judgments, rendered in *Prince George's* county court, in favor of said *Holmes*, are correctly recited in the writs of executions contained in the said transcript of the record from the Court of Appeals, and then read in evidence the following deed from

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the sheriff who made the sale recited in the said transcript to the said *Belmear*, who is therein returned as the purchaser of the property, which deed is as follows, to wit, &c. This deed comprised the land returned as sold.

And then offered and read in evidence a deed from said *Francis Belmear*, the purchaser of said property, to *Eliza Isaac*, one of the lessors of the plaintiff, and the wife of *Richard W. Isaac*, the other lessor, and proved the correctness of the location of said title papers, as made upon the plats by the plaintiff.

The defendant then to maintain the issue on his part, read to the jury a mortgage deed from the said *Walter S. Clarke* to the defendant and one *John Perkins*, dated 14th August, 1820, conveying the said lands. Also a deed from *Joshua T. Clarke* to the defendant, of the said lands, dated the 2nd October, 1827, and from *Philip Green* to *Joshua T. Clarke*, dated the 2nd March, 1812, and proved the correctness of the location of said deeds upon the plats. He further proved that *Walter S. Clarke*, the defendant in the said judgment, at suit of *William Holmes*, died intestate, sometime in the year 1828 or 1829, without issue, leaving a widow and the defendant his brother, and several other brothers and sisters his heirs at law. And the defendant then called several witnesses, by whom he proposed to prove, that at the sheriff's sale before mentioned, *R. W. Isaac*, one of the lessors of the plaintiff, officiated as the deputy of the high sheriff of the county, and as such sold the aforesaid lands to the said *Belmear*. And he further offered to prove various declarations and assertions made by the said *Belmear*, to the effect, that at the said sale, and in the purchase of said property, he the said *Belmear*, was buying said property for the said *Isaac*, and as his agent; and also offered evidence of similar declarations made by said *Isaac*.

And after the plaintiff had offered evidence, going to rebut the effect of the evidence thus offered by the defendant, the plaintiff by his counsel prayed the opinion of the court, and their instruction to the jury, that even though the jury might be of opinion, from the evidence, that the said *Belmear*, in

Isaac and wife's lessee vs. Clarke.—1844.

purchasing said land, acted as the agent of said *Isaac*, and bought for him, yet still in this court, such facts constitute no defence in the present action, and the remedy of the parties, for a sale under such circumstances, is only in a court of equity. But the court (C. DORSEY, A. J.) refused the prayer thus made by the plaintiff, being of opinion, and so directing the jury, that if they should find from the evidence, that *Belmear*, in making said purchase, acted as agent of said *Isaac*, and bought for him, and that the said *Clarke* is one of the heirs of said *Walter S. Clarke*, the sale is void, and is a good defence to the present action. To this refusal to give the instruction as prayed by the plaintiff, and to the instruction as given, the plaintiff excepted.

3RD EXCEPTION. After the evidence in the previous exceptions, which by agreement constitute parts of this exception, the plaintiff further to maintain the issue joined upon his part, *offered to read to the jury* the following transcript of a record from the Court of Chancery, for the purpose of laying before the jury the statements contained in the bill and answers, and for the further purpose of showing that a court of competent jurisdiction had dismissed a bill filed by the present defendant against one of the present plaintiffs and *F. Belmear*, impeaching the validity of the sale relied upon by the plaintiffs in support of their title to the land for which the present action is brought, and that consequently the defendant cannot now question that title.

The object of the bill filed by *Caleb Clarke*, on the 12th April, 1827, against *Richard W. Isaac* and *Francis Belmear*, was to impeach the sale made by *Isaac*, under the writ of *venditioni exponas* mentioned in the bills of exceptions, and to restrain them by injunction, &c. The defendants answered the bill, and at July term, 1827, the complainant was laid under a rule to take further proceedings on or before the fourth day of the next term of the Court of Chancery, and at the following term the bill was dismissed by the Chancellor, under that rule, with costs to the defendant.

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But the court upon the objection of the defendant's counsel refused to permit the answers in the said record to be read to the jury, and were of opinion that the dismissal of the bill in the record contained, in the manner in which the same was dismissed, did not prevent the complainant there, who is the defendant here, from contesting the validity of said sale. To which refusal to suffer the said record to be read to the jury for the purpose aforesaid, and to the opinion of the court so given, the plaintiff excepted.

4TH EXCEPTION. After the evidence contained in the preceding bills of exception, and which by agreement is made a part of this exception, the plaintiff further to maintain the issue joined on his part, proved to the jury that the mortgage from *W. S. Clarke* to the defendant and *John Perkins*, of the 14th of August, 1820, was given without consideration, and then proved that after the affirmance of the judgment of the Court of Appeals, at June term, 1829, the transcript of the record of which is set forth in the plaintiff's second exception, a writ of *habere facias possessionem* issued, returnable to the December term, 1829, of that court, which was returned "not executed." That another similar writ issued to June term, 1830, of that court, which was also returned "unexecuted." And thereafter, laying the proper foundation for that purpose, and for the purpose of proving that said *Walter S. Clarke* had, after the affirmance of the said judgment by the Court of Appeals, become the tenant of the said *Belmear*, offered to prove by a competent witness that some time in the year 1830, the said *Belmear* called upon the witness, and showed him a paper signed by the said *W. S. Clarke*, and dated, as he thinks, in 1830, in which the said *Clarke* acknowledged himself to be in possession of said land, as the tenant of said *Belmear*, and agreed to pay him a rent for the use of land; and thereupon the plaintiff prayed the court to instruct the jury, that if they find from the evidence that the deed of mortgage from *W. S. Clarke* to the defendant and *John Perkins*, of June, 1820, was given without consideration, that it passed no title to the mortgagees, and the title to the property therein mentioned, not-

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withstanding such mortgage, remained in the mortgagor, *W. S. Clarke*; of which opinion the court was. And the plaintiff prayed the court to instruct the jury, if they further find that after the sale by the sheriff to *Francis Belmear*, and the payment of the purchase money by him, if they find such payment and sale were in fact made, the said *W. S. Clarke* acknowledged himself in writing to be the tenant of the said *Belmear*, and agreed to pay him rent for the said land, then neither the said *Clarke*, nor any one claiming under him by title subsequent to the sale to said *Belmear*, can dispute his title to said land. But the court was of opinion, and so instructed the jury, that if the jury shall find from the evidence, the said *Clarke* was in possession of the said land at the time when the said contract and agreement was alleged to have been entered into, and that he did not originally enter thereon as tenant to the said *Belmear*, that then such agreement does not prevent the defendant from contesting the title of the lessors of the plaintiff. To which refusal of the court to give the instruction as prayed by the plaintiff, and to the instruction as given by the court, the plaintiff excepted.

5TH EXCEPTION. After the evidence in the preceding exceptions, which by agreement is made a part of this exception, and when the plaintiff was about reading to the jury the following deed from *Joshua T. Clarke* to said *Walter S. Clarke*, of the 17th of September, 1813, which is as follows, to wit:

This indenture, made this 17th day of September, in the year of our Lord one thousand eight hundred and thirteen, between *Joshua T. Clarke*, of *Prince George's* county, and State of *Maryland*, of the one part, and *Walter S. Clarke*, of the county and State aforesaid, of the other part, witnesseth, that the said *Joshua T. Clarke*, &c., hath granted, &c., unto the said *Walter S. Clarke*, his, &c., part of a tract of land called *Burgess' Delight*, part of a tract of land called *Hickory Thicket*, and part of a tract of land called *Clarke's Fancy*, beginning at or near a stone near the main road that leads to the mill now occupied by *Jacob Wheeler*, thence a southerly course, so as to include the dwelling house lately occupied by *Philip*

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Green, and the orchard contiguous thereto, bounding on the south with a line drawn easterly to *Patuxent* river, thence bounding on and with said river to the extent of the said land, on the north with the said land to the beginning, so as to include two hundred acres of land, more or less, on the east side of said southerly line from the beginning, together with all, &c.

The defendant, by his counsel, prayed the court to instruct the jury, that no title could be derived to the grantee in the said deed, because *the description of the property therein contained was too vague, and that said deed was void for uncertainty*; and the court being of opinion that said deed is void for uncertainty, refused to suffer the plaintiff to read the same in support of his claim and pretensions. To which opinion and refusal of the court to suffer the said deed to be read, the plaintiff excepted.

6TH EXCEPTION. At the trial of this cause, and after the giving the evidence contained in the preceding bills of exceptions, and which is agreed to be incorporated and made a part of this exception, the plaintiff, by his counsel, upon said evidence, prayed the court to instruct the jury, that if they believed from the evidence that the mortgage from *Walter S. Clarke* to *Caleb Clarke* and *John Perkins*, was executed without any consideration being paid for the same, by the grantees therein, that then the said mortgage was fraudulent and void, as against the creditors of said *Walter S. Clarke*, and that if the jury further find from the evidence, that some time after the sale of said land to *Belmear*, under the judgment of *Holmes*, by the deputy sheriff of *Prince George's* county, if the jury further find from the evidence, that sometime after the sale of said land to *Belmear*, under the judgment of *Holmes*, by the deputy sheriff of *Prince George's* county, if the jury should find such sale to have been made, the said *Walter S. Clarke*, with a knowledge of the circumstances under which the sale was made, acknowledged himself in writing to be the tenant of said land of said *Belmear*, and agreed to pay him a rent for the same, that then said written agreement, if the jury finds the existence of the same as aforesaid, is evidence to the jury

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that the said *Walter S. Clarke* acquiesced in the said sale, and the regularity or validity of the same cannot be impeached by any person claiming title to said land under said *Walter S. Clarke*, and who entered in possession under said title after the date of said written contract for rent. But the court refused to grant the said prayer and instruction to the jury; from which refusal to grant said instruction to the jury, the plaintiffs excepted.

The verdict and judgment being against the plaintiffs, they prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By J. JOHNSON and T. S. ALEXANDER, for the Appellant.

Who cited on the question of restoring the jurors competency 6 *Wendel* 389, 3 *Chit. G. P.* 795, 3 *Harr. & McHenry*, 101.

On the question of sale by sheriff to his agent, 4 *Gill & J.* 376, 4 *Ran. Va. Rep.* 199.

On the relation of landlord and tenant, 1 *Cain. N. Y. Rep.* 444, 7 *John. Rep.* 186, 3 *John.* 223, 10 *John.* 301, 6 *Law Lib.* 293, *Comyn on L. & T.* 519, 7 *Term Rep.* 488, 10 *East* 350, 12 *John.* 427, 37 *E. C. L. Rep.* 93, 15 *Ib.* 267.

Effect of sale under judicial process as against the defendant, and those in under him. 3 *Cain.* 188, 1 *Wendel*, 418, 10 *John.* 224.

The statement of a fact by a judge in the progress of a cause will be taken as true, 6 *H. & J.* 407, 9 *G. & J.* 71.

Error in the description of land, 1 *G. & J.* 443.

Effect of dismissal of bill in chancery, 2 *H. & G.* 374.

By C. C. MAGRUDER and A. C. MAGRUDER, for Appellee.

In relation to the competency of the juror, cited 3 *Bac. Jury* 764, *Let. E.*, 21 *Viner Ab.*, 274 *Trials*, 8 *Barn. & Cres.*

The sheriff's sale to himself a nullity, void, *Story on Agen.* 30, 31, 198, 199, 2 *Camp.* 203, 5 *Barn. & Ald.* 333, 7 *E. C. L.* 120, 3 *John. Cas.* 29, 4 *Cowen* 717, 7 *John.* 252, 16 *John.* 197, 3 *Bacon* 605, 1 *J. C. R.* 140.

Isaac and wife's lessee vs. Clarke.—1844.

A defendant in ejectment may show fraud or collusion between sheriff and purchaser, and hence the plaintiff, purchaser, has no title. 4 *Harr. & McH.* 398, 5 *Har. & J.* 54, 7 *G. & J.* 494, 2 *Cow. Phil.* 62, 6 *Taun.* 202, 7 *Wendell* 401, 9 *E. C. L.* 294.

Deed void for uncertainty, 10 *G. & J.* 7.

Effect of bill dismissed, 11 *G. & J.* 173, 1 *Sto. Eq. Pl.* 610.

CHAMBERS, J., delivered the opinion of this court.

Under the peculiar circumstances of this case, the competency of the juror was restored by his conveyance of all his interest in the property in contest. In this opinion, however, the court is not unanimous. The *first* exception is therefore affirmed.

We think the instruction given in the *second* exception was erroneous. A sale made by a sheriff to his own agent is not necessarily void at law, but voidable for fraud in fact. The jury alone is the proper tribunal to pronounce upon the fact of fraud, and the circumstance that the purchaser is an agent of the sheriff will be properly regarded with much suspicion.

The opinion expressed in the *third* exception is entirely approved. Such a proceeding in Chancery as the appellant offered could not, upon any received principle, preclude the appellee from using any defence at law which could otherwise be urged.

We think the court below erred in the opinions contained in the *fourth* and *sixth* exceptions. The general rule is that a party consenting to hold as lessee cannot afterwards deny the title of his acknowledged landlord. There are exceptions to this rule; but they do not rest on the fact, that the acknowledgement was made by the tenant subsequent to his coming into possession, or that he originally had possession under another title. The circumstances of deception, mistake, or other grounds which exempt a tenant from the influence of the rule, apply as well to the case of admissions after his possession, as before.

We cannot concur with the County Court in the opinion given in the *fifth* exception. After an attentive consideration

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of the deed, we cannot perceive on its face the obvious uncertainty and vagueness which must make it impossible to locate it. On the contrary, it appears to us, looking, as we must do, to the face of the deed, to be quite capable of a certain location, according to the metes and bounds expressed; and a deed capable of a certain location is, for that reason, sufficiently certain to pass the title.

Differing with the court below in the *second, fourth, fifth, sixth* exceptions, we must reverse the judgment, with costs to appellant, and issue procedendo.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

ARCHER and CHAMBERS, J., dissented on the first exception.

THOMAS BURGESS vs. ARTHUR PUE, JR.—June 1844.

By the act of 1828, ch. 169, sec. 5, mere formal objections to the legality of the proceedings of the meeting of the inhabitants or trustees of any school district for the public instruction of youth in primary schools, or irregularity therein, are to be disregarded.

By the act of 1825, ch. 162, sec. 8, the collector of the school tax is to be appointed by the taxable inhabitants of the district, and by the 11th section he is required to give bond, with security, to the satisfaction of the trustees, for the faithful discharge of his official duties. The election to be valid must be made by the taxable inhabitants.

The act of 1839, ch. 90, makes no change in the power of appointing such a collector.

A collector of taxes not selected by competent authority, although he gives bond for the discharge of his duties, has no legal warrant to act, and all his proceedings are tortious and unlawful.

The legislature may delegate the power of taxation to the taxable inhabitants, for the purpose of raising a fund for the diffusion of knowledge and the support of primary schools, within their respective school districts.

Grants of similar powers to other bodies, for political purposes, have been co-eval with the Constitution itself, and no serious doubts have ever been entertained of their validity.

APPEAL from *Howard District Court*.

This was an action of *Replevin*, commenced on the 8th February, 1843, on the following warrant:

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HOWARD DISTRICT OF ANNE ARUNDEL COUNTY, *to wit*: Whereas, on the sixth day of February, eighteen hundred and forty-three, instant, before the subscriber, one of the justices of the peace of the State of Maryland, in and for the said district, *Arthur Pue, jr.*, of the said district, made oath, that one yoke of pied oxen, belonging to him, have been illegally and unjustly seized in execution for school taxes, for district No. 30, by *Thomas Burgess*, the collector, which affidavit is hereto annexed, whereby it appears to me that it is necessary for the purposes of justice, that a replevin should issue; you are hereby empowered and directed to issue a replevin for the following chattels, taken as aforesaid, to wit, one yoke of "pied oxen," and this shall be your warrant for the same. Witness my hand and seal, this sixth day of February, 1843.

JOHN FORREST, (Seal.)

HOWARD DISTRICT OF ANNE ARUNDEL COUNTY, *to wit*: Be it remembered, that on this sixth day of February, eighteen hundred and forty-three, before me, the subscriber, one of the justices of the peace of the State of Maryland, in and for said district, personally appeared *Arthur Pue, jr.*, of the said district, and made oath on the Holy Evangely of Almighty God, that a yoke of pied oxen have been illegally and unjustly seized by the collector, *Thomas Burgess*, for school taxes, for primary school district No. 30, of said district.

Sworn before,

JOHN FORREST, (Seal.)

To *John L. Moore*, clerk of *Howard District* of *A. A.* county.

The appellee having filed a replevin bond, the writ issued, and the goods so taken were replevied and delivered to the appellee, who filed his declaration claiming the same.

The case was then submitted on the following statement of facts:

Under the provisions of the act for the public instruction of youth in primary schools throughout the State, and the several supplements thereto, *Anne Arundel* county was divided into primary school districts; the *locus in quo* constitutes part of primary school district No. 30, of said county, in that division.

In the year 1832, a primary school was organized in said school district, and has ever since been kept up in fact.

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The regularity and legality of such organization and continuance, are denied by the plaintiff, but affirmed by the defendant.

At an annual meeting of taxables of the district, held in the district in July, 1842, certain proceedings were held, of which the following is a copy :

“ July 30, 1842. The twelfth annual meeting of the taxable inhabitants of primary school district No. 30, *Howard District*, *A. A.* county, convened, and on motion, *George Ellicott* was called to the chair, and *McLane Brown* appointed secretary. On motion, the secretary read the trustees’ annual report. Mr. *Ijams* moved the adoption of said report; determined in the affirmative. *McLane Brown* moved a levy of eight cents on the \$100. *C. S. W. Dorsey* moved as a substitute, four cents; determined in the negative. The vote was then taken on *McLane Brown’s* motion, and determined in the affirmative. Mr. *Wright* nominated *George L. Stockett*, *J. P. Ijams* and *George Ellicott*, as trustees for the ensuing year. *Henry H. Pue* nominated *Levi Chaney*, *William Smith* and *Anthony Smith*. The question was then taken on the nomination of *George L. Stockett*, unanimously elected; *J. P. Ijams* and *George Ellicott*, unanimously elected. *Ijams* nominated *George L. Stockett*, as clerk—elected unanimously. On motion, *C. S. W. Dorsey*, resolved, that the trustees report to the next annual meeting the number and names of the children attending school, and who pay capitation tax, and the time of their attendance.

On motion of *A. Smith*, the meeting adjourned to meet the last Saturday of July, 1843, at 10 o’clock A. M.

Signed, *McLane Brown*, Sec’y. GEO. ELLICOTT, Ch’n.

A true copy : *George L. Stockett*, Clerk.”

That the trustees were elected *viva voce*, and not by ballot, the plaintiff being then present and voting; that the said meeting was held after due notice thereof; that after the adjournment of the meeting, the trustees placed in the hands of defendant, on the 12th December, 1842, who was at that time sheriff and collector of *Howard District*, a list of the taxables and pro-

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perty liable to taxation of said District, with a warrant for collection thereof, as follows :

“Copy of tax list for primary school district No. 30, Howard District, A. A. county.—1842.

1 *Brown, McLane,* - - - - \$1.71½, &c.

HOWARD DISTRICT OF A. A. COUNTY, *to wit:* To *Thomas Burgess*, collector of *Howard District, A. A. county*, greeting: You are hereby required and commanded, to collect from each of the inhabitants of said district, the several sums of money written opposite to the name of each of said inhabitants in the annexed tax list, and within sixty days after receiving this warrant, to pay the amount of the monies by you collected, into the hands of the trustees of said district, or some one of them, and take their or his receipt therefor, and if any of said inhabitants shall neglect or refuse to pay the same, you are hereby further commanded to levy on the goods and chattels of each delinquent, and make sale thereof according to law. Given under our hands and seals, this 12th day of December, 1843.

GEO. L. STOCKETT, (Seal.)

J. P. IJAMS, (Seal.)

GEO. ELLICOTT, (Seal.) Trustees.”

That the defendant, at the time of receiving such list, gave bond in proper form for collection of said taxes ; that he never was elected, selected or appointed collector by the taxables of school district No. 30, of *Howard District*, but was selected and elected by the trustees ; that the clerk elected as aforesaid, did not give bond as such, as required by law ; that the plaintiff, in July, 1842, was and ever since has been a taxable inhabitant of said district, and named in said tax list, and because of his failure to pay the said taxes, assessed against him as aforesaid, the defendant, as collector as aforesaid, levied on and took in execution the property in the declaration mentioned, for the purpose of raising the tax, so assessed against the plaintiff. The original act, for the public instruction of youth in primary schools throughout this State, and the supplements thereto, and all other acts applicable to primary schools in *Anne Arundel county* and *Howard District*, shall be

treated as part of this statement, and read from the printed books.

It is insisted by the plaintiff, that no evidence out of the record book of the proceedings of taxables, is admissible to shew that notice of the meeting as aforesaid was given, and the admission herein, that such notice was in fact given, is made subject to such exceptions.

On the part of the defendant it is objected, that no evidence out of said record, is admissible for the purpose of shewing that the said meeting was illegally or irregularly held, or conducted with a view of charging him in this action; that all admissions of facts by him, not shewn by said record book, are to be taken, as made subject to such objection; that the act, entitled, an act to provide for the public instruction of youth in primary schools, throughout this State, is unconstitutional and void, because the validity and operation of the same, in any county of the State, was dependent on the votes of a majority of the voters of each county, and if the majority of the said voters of any county should be in favor of the establishment of primary schools, as is therein provided for, then and in that case the said act should be valid for such county or counties, otherwise of no effect whatever, and if a majority of the voters of any county in this State should be against the establishment of primary schools, as established by this act, then in that case the said act should be void as to that county; that the act aforesaid, and the act entitled an act to provide for the public instruction of youth in primary schools in *Anne Arundel* county, are unconstitutional and void, as far as the said acts authorise one or more of the *taxable* inhabitants of any school district in *Anne Arundel* county, to vote a tax on the assessable property of said district, to build school houses, furnish them with the necessary fuel, books, stationary and appendages, and for payment of the salary of a teacher in said district; that the act, entitled, an act regulating the manner of levying on the assessable property in *Anne Arundel* county, for the support of primary schools in said county, passed the 14th February, 1830, is unconstitutional and void, as far as it

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authorises the trustees of any primary school district in *Anne Arundel* county, to require from any child attending school the payment of any sum of money not exceeding twenty-five cents a month, to be applied to the payment of the expenses of the school; that the above acts of Assembly, are in other respects, contrary to the Bill of Rights and Constitution of this State, and therefore null and void:

1st. Because said acts destroy all accountability for the power of taxation, contrary to the fourth section of the Bill of Rights.

2nd. Because the acts aforesaid impose taxes without the consent of the Legislature, contrary to the 12th section of the Bill of Rights.

That the assessment and levy for primary school district No. 30, of *Howard District*, under and by virtue of which the property of the plaintiff in this action was taken and distrained, was illegal and void:

1st. Because the meeting at which said levy was made, was not a legal district meeting, the same being held without any notice being given to the taxable inhabitants of said district, in writing, at least ten days before the time appointed for said meeting, by the district clerk, and there is no legal evidence that any notice was given.

2nd. Because at said annual meeting the clerk of said district was not elected by ballot, and did not give bond as required by law.

3rd. Because the trustees of said school district were not elected according to law, i. e., by ballot.

4th. Because the trustees of said school district did not make a rate bill or tax list, according to law, and annex to such tax list or rate bill a warrant, and deliver the same to the collector of the said school district.

5th. Because the taxable inhabitants of said school district did not elect, by ballot, a district collector at their last annual meeting, and *Thomas Burgess* has never been elected collector of said school district.

6th. The collector of said school district did not give bond with security, to the satisfaction of the trustees, for the faithful discharge of the duties of his office.

7. Because the defendant in this action is not the collector of the said school district, and has no authority in law, for collecting the tax assessed for the same.

Upon the foregoing statement and reasons, the court is requested to enter such judgment as may be right, subject to the appeal of the party against whom the judgment may be rendered.

The county court rendered judgment for the plaintiff in *replevin*, and the defendant appealed to this court.

The cause was argued before STEPHEN, ARCHER and CHAMBERS, J.

By T. S. ALEXANDER, for the appellant, and

By R. I. BOWIE, for the appellee.

STEPHEN, J., delivered the opinion of this court.

This action of *replevin* was instituted in the court below to recover certain property which had been taken by the appellant, as collector, for a school tax alleged to be due by the appellee, and which had been imposed by the taxable inhabitants of a school district, under the system of primary schools as established by law. The judgment of the court below was in favor of the plaintiff in that court, and defendant appealed to this tribunal to obtain a reversal of that judgment, on the ground that it was erroneous, and that the suit ought not to have been sustained.

In support of the decision which was rendered in his favor, the appellee has taken several exceptions to the legality of the proceedings of the meeting of the inhabitants by which the levy was made, and also to the validity and regularity of the meeting itself. Mere formal objections are cured by an act of Assembly which was passed for the express purpose of healing all such informalities. Under the operation of that act, which passed in the year 1828, ch. 169, all matters of form are to

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be disregarded, and matters of substance alone to be attended to; its language is, "that the aforesaid act (meaning the act for the public instruction of youth in primary schools throughout the State,) and this act be, and the same are hereby declared to be, public and remedial acts, and shall be construed by all courts of justice according to the equity thereof, and no proceedings of the inhabitants or of the trustees of any school district, shall be set aside or adjudged to be void, for defect of form, or for any irregularity therein, so as the requisitions of said acts are substantially complied with." But the objection to the legality of the appointment of the collector is, we think, fatal and well founded, notwithstanding the provisions of that act. His power to act was not legitimate, because he was not elected by the competent authority. The act of 1825, ch. 162, sec. 8, expressly vests the power of appointing the district collector in the taxable inhabitants of the district, and by sec. 11, he is required to give bond, with security, to the satisfaction of the trustees, for the faithful discharge of the duties of his office. The same section further provides that the collector of the county charges may be eligible as the district collector, but the election, to be valid, must still be made by the taxable inhabitants, as the power of the trustees is limited to the taking of the bond, with security. By an act of Assembly passed in the year 1837, ch. 90, it is made the duty of "any sheriff or county collector, in *Anne Arundel* county or *Howard District*, in the event of being selected or appointed a collector for any or all of the school districts, to accept of the appointment, or forfeit for each refusal the sum of one hundred dollars;" but no change in the mode of appointment is provided for or authorised by that act. The collector in this case, not being selected by the competent authority, that is to say, by the taxable inhabitants of the school district, had no legal warrant or authority to act, and all his proceedings being tortious and unlawful, the action of replevin was properly sustained by the court below. This defect renders it unnecessary to inquire whether other objections, which have been taken to the proceedings, are fatal.

We think there was no validity in the constitutional question which was raised by the appellee's counsel in the course of his argument, relative to the competency of the legislature to delegate the power of taxation to the taxable inhabitants for the purpose of raising a fund for the diffusion of knowledge and the support of primary schools. The object was a laudable one, and there is nothing in the Constitution prohibitory of the delegation of the power of taxation, in the mode adopted, to effect the attainment of it; we may say that grants of similar powers to other bodies, for political purposes, have been co-eval with the Constitution itself, and that no serious doubts have ever been entertained of their validity. It is therefore too late at this day to raise such an objection. The ground of the objection taken in the argument to the constitutionality of the tax, seemed to be, that the act of the legislature delegating the power of taxation to the taxable inhabitants was a violation of the fourth and twelfth sections of the Bill of Rights, the first of which provides "that all persons invested with the legislative or executive powers of government, are the trustees of the public, and as such accountable for their conduct;" and the last, "that no aid, charge, tax, fee or fees, ought to be set, rated or levied, under any pretence, without consent of the legislature." It is not perceived how the act in question can be deemed a violation of either of those principles of the fundamental law. The tax was certainly levied with the consent of the legislature, because the power to impose it emanated from the legislative department of the government, and was expressly given by a law passed for that purpose, and there is nothing in it which can be considered as in the slightest degree impairing the responsibility of the law-making power to their constituents, for the due and faithful execution of the trust confided to them, because if deemed to be unwise or inexpedient, an expression of the popular will to that effect was all that was necessary to procure its repeal.

Some other objections to the regularity of the proceedings, connected with this case, were made by the counsel for the appellee in the course of his argument, which it is deemed

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unnecessary to consider, this court being of opinion that the judgment of the court below was correct, and that the same ought to be affirmed.

JUDGMENT AFFIRMED.

**THE BALTIMORE AND SUSQUEHANNA RAILROAD COMPANY
vs. TILGHMAN G. COMPTON AND OTHERS.—June, 1844.**

Where an inquisition was taken, returned, and ratified, according to law, upon proceedings by a railroad company, which found that a piece or parcel of land was wanted by the company for the construction of their road, and assessed the damages which the owner of the fee would sustain by the use and occupation of his land for the purpose aforesaid, at, &c., all questions having relation to the damage done by the location and construction of the road are terminated and concluded by such inquest.

And hence in an action brought by the owner of a fee against the company for having, after the construction of the road through his land, (the benefits of which construction to the plaintiff had been submitted to the jurors upon the inquisition aforesaid,) abandoned the same, and constructed the road anew in another location, off the plaintiff's land, the plaintiff cannot give evidence of the damage which would accrue to him from such original construction independent of the inquisition.

After a railroad company had constructed its road by authority of law, through the plaintiff's land, condemned for that object, they were authorised to alter the location of their road between two given points. They re-constructed their road, and abandoned that part which had been made through the plaintiff's land. **HELD:** that the authority derived from the legislature to alter the location, did not exempt the company from liability to the plaintiff for the loss sustained by him by reason of such abandonment.

Where a railroad company had constructed a road, then abandoned it in part, and changed the location *pro tanto*, a plaintiff through whose land the road originally passed, having sustained no damage or injury in fact, by the alteration, cannot maintain an action for such change of location.

An inquisition to condemn land for the use of the B. and S. Railroad Company, in *Baltimore county*, out of the limits of the *City of Baltimore*, ought not to be held upon the warrant of a justice of the peace appointed for said city. *Per Baltimore county court.*

Under the act of 1827, ch. 72, resident jurors in the city of *Baltimore* may be summoned to act in any part of *Baltimore county*. *Ib.*

The description in an inquisition of land condemned, ought to be sufficiently certain. The omission to insert the name of the tract is not fatal. A

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description is sufficient when it calls for stones, trees, planted boundaries, fixed objects, or where it takes for the beginning of the land intended to be described, any spot or point of beginning on land either conveyed to the company and recorded, or on land theretofore condemned by inquisition, recorded. *Ib.*

The description in an inquisition beginning for the land condemned at station No. 147, on the location of said railroad, and running thence to station No. 170, being 23 stations of 100 feet each in length, and occupying a space of 66 feet in width, is not sufficiently accurate to authorise its ratification. *Ib.*

Under the charter of the B. and S. Railroad Company, the inquisition for the condemnation of land should state that it was for the construction of the road, in that event the entire interest is condemned. *Ib.*

APPEAL from *Baltimore County Court.*

This was an action of *Trespass upon the case*, commenced on the 21st December, 1839, by the appellees against the appellants. The declaration of the plaintiff alleged :

1ST COUNT. That whereas by an act of the General Assembly of *Maryland*, entitled “An act to incorporate the B. & S. R. R. Co.” it was amongst other things enacted, that the subscribers of the stock therein mentioned, their successors and assigns, should be, and they were thereby declared to be, incorporated into a company, &c.; and amongst other things in the said act mentioned and enumerated, the president and directors of the said company were invested with all the rights and powers necessary for the construction and repair of a railroad from the *City of Baltimore* to some suitable point or points on the *Susquehanna river*, to be by them determined, not exceeding sixty-six feet wide ; and whereas by the said act of Assembly, it was also enacted, that the president and directors of said company, or a majority of them, or any person or persons authorised by a majority of them, might agree with the owner or owners of any land, earth, &c., or any improvements which might be wanted for the construction or repair of any of said roads, or any of their works, for the purchase or use and occupation of the same, and if they could not agree, or if the owner or owners, or any of them, be a *feme covert*, under age, *non compos mentis*, or out of the county in which the property might be, when such land and material may be want-

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ed, application might be made to any justice of the peace of such county, who should thereupon issue his warrant, under hand and seal, directed to the sheriff of said county, requiring him to summon a jury of twenty inhabitants of said county, &c., to meet on the land, or near to the other property or materials to be valued, on a day named in said warrant, not less than ten, nor more than twenty days, after the issuing of the same; and if at said time and place any of said jurors summoned should not attend, &c., that before they should act as such, the said sheriff should administer to each of them an oath or affirmation, as the case might be, *that he would justly and impartially value the damages which the owner or owners might sustain by the use and occupation of the same, required by the company, and that the jury in estimating such damages should take into the estimate the benefits resulting to the said owner or owners from the conducting such railroad through, along, or near to, the property of said owner or owners, but only in extinguishment of the claim for damages*, and that the said jury should reduce their inquisition to writing, and should sign and seal the same, and that it should then be returned by said sheriff to the clerk, &c., and should be confirmed by said court at its next session, if no sufficient cause to the contrary be shown, and when confirmed should be recorded by the said clerk, &c.; but if set aside, the said court should direct another inquisition to be taken in the manner above prescribed, and that such inquisition should describe the property taken, or the bounds of the land condemned, and the quantity of duration of the interest in the same, valued for the company, and *such valuation, when paid or tendered to the owner or owners of said property, or his, her or their legal representatives, should entitle the said company to the estate and interest in the same, thus valued, as fully as if it had been conveyed by the owner or owners of the same*; and whereas, one *Thomas Compton*, late of *Baltimore* county, deceased, who was the father of the plaintiffs in this action, was, in his life-time, to wit, on the first day of March, in the year of our Lord one thousand eight hundred and thirty-one, and at the time of his death, at the

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county aforesaid, seized in fee simple of a certain tract, or part of a tract, or parcel of land, situate, lying, and being in said county, called *Ridgely's Whim*; and whereas, on the day and year last aforesaid, at the county aforesaid, the president and directors of the said company, or a majority of them, did determine to locate and construct the *B. & S. R. R.* through, along, over and upon the said lands of the said *Thomas Compton*; and whereas, the president and directors of said company *could not agree* with the said *Thomas Compton*, for the lands so wanted for the location and construction of the said railroad, and the said *Thomas Compton* would not consent to the location and construction of the said road through, along, over, and upon his said lands, the president and directors of the said company caused the said railroad to be located, made, and constructed, through, along, over and upon the said lands of the said *Thomas Compton*, for the length of twenty-three hundred feet, and of the breadth of sixty-six feet, using and occupying therefor three acres one rood and thirty-eight perches of land, without his permission and consent, and without making or allowing him any compensation whatever therefor. And the said plaintiffs further say, that in the making and constructing of the said road through, along, over and upon the said lands of the said *Thomas Compton*, as aforesaid, the president and directors of the said company caused an embankment, consisting of earth, stone and gravel, to be made, of the length of two thousand feet, of the breadth of thirty feet, and of the height of ten feet, on one part of the said land, and that the president and directors of the said company also caused to be made, an excavation, of the length of two hundred feet, of the breadth of sixty-six feet, and of the depth of twenty feet, on another portion of said land, to the great damage and injury of said *Thomas Compton*. And the said plaintiffs further say, that afterwards, to wit, on the sixteenth day March, in the year eighteen hundred and thirty-one, at the county aforesaid, the *B. & S. R. R. Co.* made application to *Henry Brice, esquire*, a justice of the peace of the State of *Maryland*, in and for the city of *Baltimore*, to issue his war-

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rant, under his hand and seal, directed to the sheriff of said county, requiring him to summon a jury of, &c., as the jury of inquest of damages in the matter of the said *Thomas Compton*, in pursuance of the said act of Assembly, and that the said warrant was accordingly issued, directed to *Henry Green, Esq.* the then sheriff of said county, and executed and returned to *Baltimore county court*, and that afterwards, to wit, on the 30th April, 1833, the said inquisition, so taken and returned, was quashed and set aside by the court, and the said sheriff was ordered and directed to summon a new jury, which was done, and a new inquisition taken, executed and returned, and confirmed by the said court, and that the said *Thomas Compton* was allowed one cent for his damages, and no more. And the said plaintiffs further say, that the *B. & S. R. R. Co.* continued from the 16th March, 1831, until the 1st September, 1838, at, &c., to use, occupy, possess and enjoy that portion of the said tract or parcel of land hereinbefore mentioned, and the railroad thereon made and constructed, without paying or allowing any compensation whatever therefor. And that said plaintiffs further say, that the said *Thomas Compton* departed this life on or about the 1st December, 1833, at, &c., and that his real estate descended to the said plaintiffs, as his heirs-at-law.

2ND COUNT. And the said plaintiffs further say, that afterwards, to wit, by an act of the General Assembly of *Maryland*, passed at, &c., entitled “A further supplement to an act entitled an act to incorporate the *B. & S. R. R. Co.*” it was enacted that the *B. & S. R. R. Co.* be, and they were thereby authorised to alter the location of their road between *Baltimore* and *Timonium* and *Owings’ mills*, and in making such alteration have and exercise all the powers conferred by the act of incorporation for the purpose of originally constructing said road. And the said plaintiffs further say, that afterwards, to wit, on the 1st September, 1838, at, &c., the *B. & S. R. R. Co.*, in pursuance of the powers in them vested as aforesaid, altered the location of their road between *Baltimore* and *Timonium*, and abandoned all that part of their said railroad which had been located and constructed upon the lands of the said

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Thos. Compton, as aforesaid, and made and constructed their said railroad from and off the lands of the said plaintiffs, and have ceased to use and travel upon that part of their said road which was originally made and constructed upon the lands of the said plaintiffs, and have thereby entirely deprived the said plaintiffs of the benefits resulting to the said plaintiffs from the conducting of the said railroad through, along, and upon their said lands, to their great loss and injury, and without making and allowing to them, the said plaintiffs, any compensation whatever therefor. And the said plaintiffs further say, that since the passing of the several acts of Assembly hereinbefore mentioned, and since the condemnation of the lands of the plaintiffs, for the uses and purposes aforesaid, and since the original location and construction of the said railroad, and since the making of the said embankments and excavation hereinbefore mentioned, and since the making and constructing of their said railroad anew, between Baltimore and Timonium, and the abandonment of the original location and construction thereof upon the lands of the said plaintiffs, and the discontinuance of the travel thereon, to wit, on the 1st January, 1840, at, &c., and ever since, the B. & S. R. R. Co. well knowing the premises, but not regarding their own duties, nor the rights of the said plaintiffs, have not removed the said embankment, nor the earth, stone and gravel wherewith the same was made and constructed, nor have the B. & S. R. R. Co. filled up the said excavation hereinbefore mentioned, as they ought to have done, but have permitted the same to remain as made, to the great loss and damage of the said plaintiffs. By all which said premises, the said plaintiffs say that they are injured, and have sustained damage to the value of, &c.

To this declaration the defendants pleaded not guilty on the first count, on which issue was joined; and by consent of parties leave was given generally to offer special matter in evidence.

The defendants demurred to the second count, and the county court rendered judgment thereon for them. As to both

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counts, however, all “*errors in pleading*” were waived by consent.

At the trial the jury found a verdict for the plaintiffs, of \$1,643, with interest from the 25th May, 1841.

1ST EXCEPTION. The plaintiffs, to support the issue on their part, offered in evidence the charter granted to the defendants by the General Assembly, and proved that they were the children and heirs-at-law of *Thomas Compton*, in whose life-time, at the instance of the defendants, the following proceedings took place for the condemnation of a part of a tract of land, belonging to him in fee, and lying in said county, about three and a half miles from the city of *Baltimore*, and at the time of this action owned by and in the possession of the said plaintiffs, as his heirs-at-law.

“*THOMAS COMPTON*: Inquisition, condemnation and confirmation of part of his lands, for the use of the *Baltimore and Susquehanna Railroad Company* :

“Be it remembered, that on the 11th April, 1831, *H. G.*, Esq. sheriff of *B. Co.*, in pursuance of an act of the General Assembly of *Maryland*, &c., entitled “An act to incorporate the *B. & S. R. R. Co.*” made return to the court here of the following warrant, inquisition and return, to wit :

“*MARYLAND, Baltimore county*, to wit :

“To *Henry Green, Esq.*, sheriff of said county: Whereas application has been made to me, a justice of the peace of, &c., by the *P. & D.* of the *B. & S. R. R. Co.*, stating that the said company cannot agree with *T. C.* for the purchase or use and occupation of a certain tract or parcel of land, lying in said county, belonging to the said *T. C.*, and contained within the following metes and bounds, courses and distances, to wit : Beginning for the same at station No. 147, on the location of said railroad, and running thence to station No. 170, being twenty-three stations of one hundred feet each in length, and occupying a space of sixty-six feet in width, containing three and a half acres, and which said tract is wanted by the said company for the construction of a railroad from the city of *B.* towards the *S.* river, under and in conformity to the provisions

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of an act of Assembly, passed, &c., entitled "An act," &c. Now, therefore, I, the said justice, under and by virtue of the said act and application aforesaid, do hereby authorise and command you to summon a jury of twenty inhabitants of said county, not related to said *T. C.*, nor in any way interested, to meet on the land, on Monday the 28th day of March instant, the date hereof. Herein fail not, and this shall be your warrant and authority therefor. Witness my hand and seal, this 16th March, 1831. HENRY BRICE, (Seal.)"

"I hereby certify and return, that by authority and in pursuance of the commands of the within warrant to me directed, I summoned *R. D.*, &c., being a jury of twenty inhabitants of said county, not related to the within named *T. C.*, nor in any wise interested, to meet on the lands on Monday the twenty-eighth day of March, 1831, at which time and place did appear the above named persons, being the jurors aforesaid, from which pannel the president of the company did strike off, &c. leaving twelve jurors to act as a jury of inquest of damages, to wit, *R. D.*, &c.; and before the said jurors proceeded to act as such, I administered to each of them the following oath or affirmation: (as they respectively swore or affirmed,) "You do swear, (or, solemnly, sincerely and truly declare and affirm,) that you will justly and impartially value the damages which *T. C.* will sustain by the use or occupation of the tract of land required by the *B. & S. R. R. C.*, for the construction of a railroad from the city of *B.* towards the *S.* river." Whereupon, having shown to the said jury the tract of land within described, and directed the said jury to take into the estimate of damages the benefits resulting to the said *T. C.* from the passage of such railroad through and along said property, but only in the extinguishment of the claim for damages, the said jury did reduce their inquisition to writing, and did sign and seal the same in manner and form as by the original of the said inquisition, hereto annexed, and made part of this return, doth appear. Whereupon, I hereby return the said inquisition to *William Gibson*, the clerk of the said county, as directed by the act of Assembly, entitled "An act to incorporate the *Baltimore*

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and *Susquehanna Railroad Company*.” Witness my hand and seal.

HENRY GREEN, (Seal,)

Sheriff of Baltimore County.”

INQUISITION. *Maryland, B. county*: An inquisition taken at the said county, on the 28th March, 1831, before *H. G.*, sheriff, &c., on the oath of *R. D.*, &c., who, having been summoned by said sheriff, and sworn justly and impartially to value the damages which *T. C.* will sustain by the use and occupation of that piece, parcel or tract of land, owned by the said *T. C.*, situated in said county, being part of a tract called —, and contained within the following metes and bounds, courses and distances, to wit: Beginning for the same at station No. 147, on, &c., as before described in the justice’s warrant; which said piece, parcel or tract, is wanted by the *B. & S. R. R. C.* for the use of a railroad from the city of *Baltimore* towards the *Susquehanna* river, upon their oaths do say, that the said *T. C.* is not entitled to any damage by the use and occupation aforesaid. In testimony whereof, we, the subscribers, being the jurors aforesaid, have hereunto set our hands and seals, on the day and year first above written.

RICH’D DORSEY, (Seal.) &c.

I do hereby certify and return to the clerk of *Baltimore* county court, the within inquisition, taken before me, on the oaths of the jurors within named; as herein set forth and reduced to writing, and signed and sealed by the said jurors, in my presence, agreeably to the directions of the Act of Assembly, entitled, an act to incorporate the *Baltimore* and *Susquehanna* Railroad Company.

HENRY GREEN,

Sheriff of Balto. County, (Seal.)

Which said inquisition was quashed by *Baltimore* county court on the motion of the said *T. C.*

1st. The court is of opinion that the issuing of the warrant by *H. B.*, he being “a justice of the peace of the State of *Maryland*, in and for the city of *Baltimore*,” was irregular, and affords proper ground for quashing the inquisition.

2nd. The court is of opinion that the summoning of jurors

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resident in the city of *Baltimore*, is not contrary to law, for the purposes contemplated by the act of 1827, chap. 72, and within its intent and meaning, jurors may be taken from any part of the entire county, of which county, for that purpose, the city of *Baltimore* is a part. The jurors summoned must be disinterested within the intent and provisions of the said act.

3rd. The court is of opinion that the description of the land condemned is not sufficiently certain, but that the omission to insert the name of the tract of land is not a fatal defect. The description would have been sufficiently accurate if it had called for stones, trees, or any boundaries planted, or other fixed objects, or if it had taken for the beginning of the land intended to be described, any spot or point of beginning on land either conveyed to the railroad company, and therefore rendered certain by the record of the deed of conveyance, or on land theretofore condemned by inquisition, for the use of the company, if the inquisition was recorded.

4th. The court is of opinion, also, that the inquisition ought to have set forth that the land was condemned for the use of the company, *for construction*, which would have been sufficient, but the statement of that fact in the warrant, does not, in the opinion of the court, comply with the requisition of the law, that it should appear in the inquisition.

5th. The court is of opinion that it is not necessary for the inquisition, in order to comply with that part of the law which requires the jury to state "the quantity of duration of interest," to set forth whether the land is condemned in fee, for life, or years, or otherwise, but that the inquisition will be good if it sufficiently appear on its face, as it will do if the land be stated to be wanted "for construction" of the railroad, that the entire interest in the land condemned is intended to be taken.

The county court, on the 30th April 1833, ordered and decreed, that the sheriff of *Baltimore* county summon a jury of twenty inhabitants of said county, not related to the said defendant, nor in any wise interested in the said matter, to meet on the said lands of the said *T. C.*, required by the said plain-

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tiffs for the uses, purposes and operations of the said plaintiffs, or near thereto, on the 18th day of May next, and if, at the said time and place, any, &c., from which panel each of the said parties, his or their agent or attorney, may strike four jurors, and in the absence of the said parties, or either of them, or their agent or attorney, the said sheriff shall strike four persons for each or either of said parties from said panel, and the remaining twelve jurors shall act as the jury of inquest of damages in the said cause, but before they act as such, the said sheriff shall administer to each of them an oath or affirmation, as the case may be, that he will justly and impartially value and assess the damages which the said defendant will sustain by the use and occupation of his lands and premises by the said plaintiffs, and the said jury, in estimating such damages, shall take into the estimate the benefits resulting to the said defendant from constructing such railroad through, along or near to the property of said defendant, but only in extinguishment of damages, and the said jury shall sign and seal their said inquisition, and deliver it to the said sheriff, and the said sheriff shall forthwith return the same to this court.

The inquisition returned by the sheriff under the order of *Baltimore* county court, after reciting the proceedings, stated that the jurors were sworn justly and impartially to value and assess the damages which *T. C.* will sustain by the use and occupation, for the purpose of construction of the railroad, of that piece, parcel or tract of land owned by the said *T. C.*, situated in said county, being part of tract called "*Ridgely's Whim*," or by whatsoever name or names the same may be called or known, and contained within the following metes and bounds, courses and distances, to wit: beginning for the same at a stone placed in the ground, forty-seven feet from a *Hickory tree*, being on the boundary line of said tract, marked with three notches, and at a station stake numbered 147, on the line of the *B. & S. R. R.*, and running thence, north 26° 30' east, one hundred feet, thence north 18° 30' east, one hundred feet, thence north 7° 30' east, seven hundred

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feet, thence north $5^{\circ} 30'$ east, one hundred feet, thence north $1^{\circ} 30'$ east, one hundred feet, thence north $2^{\circ} 30'$ west, one hundred feet, thence north $8^{\circ} 30'$ east, one hundred feet, thence north 14° west, one hundred feet, thence north 18° west, one hundred feet, thence north 19° west, one hundred feet, thence north 21° west, one hundred feet, thence north 25° west, one hundred feet, thence north 23° west, one hundred feet, thence north $14^{\circ} 30'$ west, one hundred feet, thence north 3° west, one hundred feet, thence north 4° east, one hundred feet, thence north 3° west, one hundred feet, to station No. 170, on the line of said road, supposed to be the termination of the land owned and occupied by the said *T. C.*, containing, by the above described courses, and a constant width of 66 feet, three acres, one rod, and thirty-eight perches of land, more or less, which said piece, parcel or tract is wanted by the *B. & S. R. R. Co.* for construction of a railroad from the city of *B.* towards the *S.* river, upon their oaths do say, that they value and assess the damages which the said *Thomas Compton* will sustain by the use and occupation aforesaid, at the sum of *one cent*. In testimony whereof, we, &c.

The inquest was ratified and confirmed on the 6th November 1833.

This plaintiffs further offered in evidence, that under and by virtue of such condemnation, the said defendants took possession of the parcel of land in said proceedings described, and proceeded to make an excavation and embankment thereon, and completed upon the same their railroad, and used and travelled said road; and further offered in evidence from the printed statute book, a supplement to the charter of the defendants, granted by the General Assembly at December session 1835, chap. 371, in pursuance of the provisions of which, the defendants, on the 1st January 1838, abandoned all that portion of their railroad which had been so as aforesaid constructed on the land of said *T. C.*, and took away the rails therefrom, and wholly ceased to use and travel such part of their said road; and further offered to prove by *Henry McElderry*, *John W. Ward* and *William McLanahan*, witnesses produced

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and sworn on their part, that, at the request of the said *T. C.*, and prior to the construction of the said road upon his land, they had examined said land, and had estimated the damage to accrue to him from such construction at the sum of \$1,100, and that, in their judgment, the damage done to the land by the said road, as originally constructed, amounted to that sum, for the purpose of proving which damage, said evidence was offered.

To the admissibility of which evidence, the defendants objected, upon the several grounds following :

The defendant, by its counsel, objects to the admissibility of the evidence offered by the plaintiffs, to prove the damage done to their land by the original location of the defendants' railroad.

1st. Because the action (as appears from the plaintiffs' declaration,) is brought to recover damages for changing the location of the railroad, which, heretofore, was constructed through the land of the plaintiffs, and if they are entitled to recover any thing, the measure of damages is the injury inflicted by such change, and not what may have been suffered from the first location of the road.

2nd. Because, if proof is admissible of the damage sustained by the original location and construction of the railroad of the defendant upon the lands of the plaintiffs, then that the inquisition of damages upon said land, in the lifetime of their ancestor *T. C.*, taken and returned to *Baltimore* county court, and by it confirmed, and which has been given in evidence by the plaintiffs, is conclusive as to the amount of such damages.

3rd. Because, if proof of such damage, other than, or in addition to, said inquisition, is admissible, the evidence so offered is not the best which the nature of the case admits.

The court (*R. B. MAGRUDER, A. J.*.) refused to sustain said objections, and the evidence was admitted accordingly, and went to the jury. The defendants excepted.

2ND EXCEPTION. The defendants then, to support the issue on their part, offered in evidence, that on the 1st January 1838,

under the supplement to their charter as proved, they had re-constructed off the lands of the plaintiffs, and at the distance of about two hundred yards from its old location thereon, all that portion of their rail road which had been originally located on the lands of the plaintiffs, and had completed and were using and travelling the same, and that said rail road, as so re-constructed, was of equal benefit and convenience to the said plaintiffs, as it had been where originally constructed; and further proved that the parcel of land described in the proceedings of condemnation, given in evidence by the plaintiffs, had been in the possession of the plaintiffs from the time of the re-construction of said rail road, and was claimed and admitted to belong to them; and further gave in evidence, that the same, at an expense of not more than five hundred dollars, might be rendered as valuable for cultivation, as it had been before the original construction of the rail road thereon.

The defendants then prayed the court to instruct the jury as follows:

1st. That the plaintiffs are not entitled to recover in this action, because the altered location of the rail road through the land of the plaintiffs, though it has removed the same from said land, has been by authority of, and pursuant to, and within the provisions of the act of Assembly of 1835, ch. 371, entitled a further supplement to the act entitled, an act to incorporate the *B. & S. R. R. Co.*

2nd. That the plaintiffs are not entitled to recover in this action for the removal from their land of the rail road of the defendant, unless they find some actual damage to the plaintiffs, growing out of such removal.

3rd. That if the plaintiffs are entitled to recover in this action, the measure of the damages to be awarded them, is the damage sustained by them, in having the rail road of the defendants in its present position, instead of having it upon its original location on their land, and that if the jurors find the plaintiffs to have sustained no injury from such change, then that they are not entitled to recover.

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The plaintiffs likewise prayed the court for other instructions, as follows :

The plaintiffs ask the court's instruction to the jury, that they are entitled to recover the damage done to the land and other property of the plaintiffs, by the original location of the defendants road over the same, and the abandonment of such location at the time of such abandonment, provided, the jury shall find such damage, location and abandonment, and also, that the present location of said road is on the eastern side of Jones' Falls, entirely off of the plaintiffs' land, without any deduction whatever for the benefit or advantage which the jury may find from the evidence, the plaintiffs derive from the present location of defendants road. The plaintiffs in this case claim, as a measure of damages, to recover what from the evidence in the cause the jury may find to have been the value of the land originally taken under the condemnation offered in evidence by the plaintiffs, and such other of the land as was directly injured by the making of said road, at the time the defendants totally abandoned the said location, and made and used the one on the western side of the Falls off the plaintiffs land, if the said land had never been taken by the defendants, less what the jury may find to be the value to the plaintiffs of said lands at the time of such final abandonment ; and for the purpose of proving said facts, they offered in evidence to the jury, that twenty acres of the said land, worth \$200 an acre, were by said first location, and the making of said road, rendered totally valueless, except for the purpose of said road, and as evidence thereof, offered to prove by a competent witness, *Capt. De La Roche*, as civil engineer, who had carefully examined said part of said road, that to restore the said land to its said original value of \$200 an acre, would cost at least \$5,000.

The court (R. B. MAGRUDER, A. J.) refused to instruct the jury as prayed, and gave the following direction :

If the jury shall find that the defendants originally located their rail road through the lands of the plaintiffs, and made the embankments and excavations, and completed and used the

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said road in the manner set forth in the evidence, and that defendants then abandoned the said road, and shall also find that the present location of the road is on the eastern side of Jones' Falls, entirely off the plaintiffs land, then the plaintiff are entitled to recover the damage done to the land and other property of the plaintiffs, by the original location of the defendants' road through and over the same, without any deduction whatever for any benefit or advantage which the jury may find from the evidence, the plaintiff derived from the present location of the road.

And the court further instruct the jury, that the price paid by the plaintiffs for the benefit of the road, as originally located, or the amount which was charged to, or assessed upon, the plaintiffs, at the time of the taking of the inquisition given in evidence in this cause, as benefit resulting to the plaintiffs from the location of the road through his land, and which was deducted by the jury who made the inquisition from the whole amount of damage done to the land and other property of the plaintiffs by said original location, if the jury shall find from the evidence such price or assessment and deduction, together with legal interest thereon, from the time of the abandonment of the road by the defendants, is the proper rule to regulate the jury in estimating the damages sustained by the plaintiffs.

To which direction, as given by the court, and the refusal of the prayers offered on their part, the defendants excepted.

3RD EXCEPTION. After the parties to this cause had gone before the jury under the direction of the court, as stated in the second bill of exceptions, the defendants, by their counsel, insisted that the jury were entitled to take into their estimate of damages, the sum for which the lands of the plaintiffs, occupied by the road, as originally constructed, might be rendered as valuable for cultivation as they had been prior to such original construction, and were not bound to consider said land as totally destroyed, to which the plaintiffs objected as contrary to the true construction of the direction aforesaid, and thereupon the court decided, that by the true construction of said direction, the jury were bound to consider said land as wholly destroyed. The defendants excepted.

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The judgment being against the *Baltimore and Sus. R. R. Company*, they prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., DORSEY, CHAMBERS and SPENCE, J.

By B. C. PRESTMAN and CAMPBELL for the appellants, and
By T. P. SCOTT and REVERDY JOHNSON for the appellees.

DORSEY, J., delivered the opinion of this court.

The testimony offered by the plaintiffs, in the first bill of exceptions on the part of the defendants, to prove the damage done by the location and construction of the rail road through their lands, was obnoxious to the objection taken to its reception. All questions in relation to such damage were terminated and concluded by the inquisition previously found by the jury. They formed no part of the issue then on trial. The question to be tried by the jury empannelled in the county court, was the extent of the injury which resulted to the plaintiffs by the abandonment and discontinuance of the railway on their lands; and its location and construction on the lands of another person. The county court therefore erred in admitting the testimony thus objected to by the defendant.

A majority of this court are of opinion that the county court were right in rejecting the defendant's first prayer, in his second bill of exceptions; that the plaintiffs could not recover, inasmuch as the removal of the railway complained of was made under the authority and pursuant to the provisions of the act of Assembly of 1835, ch. 371. From this opinion I have dissented; but, as no reasons have been assigned in support of it, I do not deem it necessary to state the grounds of my dissent.

The defendant's second prayer in the same exception, to wit: "that the plaintiffs are not entitled to recover in this action, for the removal from their land, of the rail road of the defendant, unless they find some actual damage to the plaintiffs growing out of such removal;" and his third prayer, to wit: "that if the plaintiffs are entitled to recover in this action

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the measure of the damage to be awarded them, is the damage sustained by them in having the rail road of the defendant in its present position, instead of having it upon its original location on their land; and that if the jurors find the plaintiffs to have sustained no injury from such change, then that they are not entitled to recover;" we think both ought to have been granted: and that in failing to do so, the county court erred.

In the third bill of exceptions, the county court was right in its construction of the instruction it had given to the jury as stated in the second bill of exceptions. The error of that court consisted in its giving the instruction, not in its interpretation of it.

This court concur with the county court in its construction of its instruction as stated in the third bill of exceptions. And a majority of this court approve of the refusal of the county court to grant the defendant's first prayer in his second bill of exceptions. But this court, dissenting from the county court's decision in the first bill of exceptions, and in its refusal to grant the defendants' second and third prayers in his second bill of exceptions, and from its instruction given in that exception to the jury, reverse its judgment.

LET A PROCEDENDO ISSUE:

ANDREW ALDRIDGE, EXECUTOR OF B. D. HIGDON, vs. JOHN T. BOSWELL.—*June 1844.*

Where a testator devised all the rest, residue and remainder of his estate unto all the children of his sister and his late brother, that are now in existence, to be equally divided amongst them per capita, share and share alike, one of his neices alive at the date of the will, married, and died before the testator. The sister and late brother had each five children alive at the date of the will. HELD: that the surviving husband of the deceased niece, was entitled to one-tenth of the testator's personal estate in the hands of his executor.

APPEAL from the *Orphans* court of *Baltimore* county.

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On the 4th October 1842, the appellee filed his petition alleging, that on the 28th February 1830, the late *Benjamin D. Higdon* of *Baltimore* city, duly made and published his last will and testament, by which said last will and testament, after making several specific bequests, he devised the residue of his estate in the following manner, to wit: "I give, devise and bequeath all the rest, residue and remainder of my estate and property, real and personal, not hereinbefore disposed of, unto all the children of my late brother *John S. Higdon*, and of my sister *Phebe E. Lambert*, of *Prince George's* county, that are now in existence, to be equally divided between and amongst them per capita, and share and share alike, to hold to them their heirs and assigns forever;" and that by said will said testator *Higdon*, also appointed *Andrew Aldridge* and *Stewart Brown*, of the city of *Baltimore*, the executors thereof. Your petitioner further states that afterwards, and in the year 1841, the said *Benjamin D. Higdon* died, without having in any manner altered or revoked said will, and leaving the said will and the aforesaid devise of the residue of his property unrevoked and in full force at his death, and that said will has been duly admitted to probate by this court; that letters testamentary thereon have been granted by this court to *Andrew Aldridge*, the surviving executor. That at the period of the execution of said will, to wit, on the 28th February 1830, *there were then in existence* the following children of the said brother *John S. Higdon*, and the said sister *Phebe E. Lambert*, mentioned in the aforesaid residuary clause of said will, to wit: the following five children of his said brother *John S. Higdon*, namely, *John B. Higdon*; *Ann*, who intermarried with *Charles A. Ely*; *Elizabeth*, who intermarried with *Urbane B. Oglesby*; *Augusta*, who intermarried with *Stoddard W. Smith*; and *Mary Jane*, who intermarried with *Matthew N. Shields*; and the following children of his said sister *Phebe E. Lambert*, to wit: *Benjamin H. Lambert*, *John J. Lambert*, *Elizabeth*, the wife of *Peter D. Hatton*, *Nancy* who intermarried with *John B. Spalding*, and *Mary* or *Polly Lambert*, who was the wife of your petitioner. That the said *Mary* or *Polly Lambert*, one of the said

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ten children of the said brother and sister of the said testator, in existence at the period of the execution of his aforesaid will, became the wife of your petitioner in the year 1831, and so continued until death, in the year 1833.

Your petitioner further states, that by virtue of the said will, and of the acts of Assembly in such case provided, he is, as he conceives and is advised, entitled, as the husband of the said *Mary Lambert*, to have and receive of the said executor her share, or the one-tenth part of the residue of the personal estate of the said *Benjamin D. Higdon*, but that the said executor declines paying over to him, or accounting to him, for said share, except under the order of this court.

Your petitioner therefore prays, &c.

The will of *Benjamin D. Higdon*, of, &c., devised as follows, viz :

I give unto my friend and partner *Mr. Andrew Aldridge*, my pew in *St. Paul's* church, and also the sum of one thousand dollars, in trust for, &c.

To *Mrs. Ann Elizabeth Higdon*, of, &c. widow of my late brother *John S. Higdon*, I give and bequeath the sum of five hundred dollars.

I will and desire that my executors hereinafter named, place in the hands of my nephew *Benjamin H. Lambert*, of *Alexandria*, in the *District of Columbia*, without requiring of him any security therefor, the sum of \$1,000; the interest, &c.

I give and bequeath to my aforesaid friend *Andrew Aldridge*, the sum of three hundred dollars, in trust, to be by him applied to the use and benefit of the Episcopal Sunday school, very lately incorporated, but by what particular name I do not know.

I give, devise and bequeath all the rest, residue and remainder of my estate and property, real and personal, not herein before disposed of, unto all the children of my late brother *John S. Higdon*, and of my sister *Phebe E. Lambert*, of, &c., that are now in existence, to be equally divided between and amongst them, *per capita*, share and share alike: to hold to them, their heirs and assigns forever.

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Whereas, *Peter D. Hatton*, who married one of the daughters of my aforesaid sister *Lambert*, stands indebted to the firm of *Aldridge & Higdon*, between two and three hundred dollars upon a note, which I desire to be charged to me on the book of the concern, but that the amount thereof be considered as constituting a portion of the residuum of my estate, and be deducted from that part or share thereof which my niece, the wife of said *Peter D. Hatton*, shall appear to be entitled to in the distribution of such residuum.

For the purpose of division and final settlement of my estate, I authorise and require my executors to sell and dispose of, either publicly or privately, as to them may seem fit, my interest, being a moiety, of and in the house and lot situate on the south side of *Baltimore* street, between *South* street and *Tripolet's* alley, in the aforesaid city of *Baltimore*, owned by *Mr. Aldridge* and myself, and on receipt of the consideration money therefor, to execute a good and valid conveyance to the purchaser or purchasers of such interest, to hold the same to him, her or them, their heirs and assigns forever.

And lastly I constitute and appoint my aforesaid friend and partner *Andrew Aldridge*, and my friend *Stewart Brown*, of the city of *Baltimore*, executors of this my last will and testament, which I again declare to be my last.

In witness whereof, I, the said *Benjamin D. Higdon*, have hereto set my hand and seal, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and thirty.

The answer of *Andrew Aldridge* executor, alleged that he admits that the said deceased executed his last will and testament in his lifetime, as is stated in said petition, and devised the residuum of his estate to the children of his late brother *John S. Higdon* and his sister *Phebe E. Lambert*, then in existence, in the manner in said petition mentioned, and thereby appointed your respondent and the late *Stewart Brown*, executors thereof, and that letters testamentary were granted to respondent alone, the said *Brown* having departed this life before the death of the said testator; that said testator de-

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parted this life without having revoked said will and testament, that the same has been duly admitted to probat, and that he believes the copy thereof exhibited with said petition, marked A, to be a true copy of said will and testament.

Your respondent further states, that he has always understood that at the date of said will and testament, there were in existence of the children of testator's brother and sister, ten persons, five of each branch, but he has no other knowledge thereof, than that he is acquainted with or has seen some of them, but not all; that he has never seen *Mary* or *Polly Lambert*, stated in said petition to have been the wife of petitioner, and does not know when he died, or was married to petitioner, and therefore leaves him to prove that she was a niece of the testator in existence at the date of the said will and testament, and that she afterwards became the wife of petitioner, and died as in said petition is stated. That having been warned by several of the residuary devisees, not to pay any part of the estate of the deceased to said petitioner, on the allegation that he is not entitled to any part thereof; your respondent therefore declines paying the same to petitioner, until he shall have fully proved his rights thereto.

On the 18th July 1843, the orphans court after proof taken, decreed that the said *John T. Boswell*, who intermarried with *Mary* or *Polly Lambert*, one of the children of *Phebe E. Lambert*, sister of the said deceased, is entitled by virtue of his marital rights to one-tenth part of the residue of the personal estate of the said *Benjamin D. Higdon*, deceased, in the hands of the said executor, and payment accordingly.

The executor appealed to this court.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, and CHAMBERS, J.

By S. I. DONALDSON and REVERDY JOHNSON for the appellants, who waived all objections as to want of parties, &c.

By McMAHON for the appellees.

BY THE COURT—

JUDGMENT AFFIRMED.

Hannon et al vs. The State, use of Robey and wife.—1844.

WALTER W. HANNON AND OTHERS, vs. THE STATE, USE OF
WILLIAM G. ROBEY AND GRACE ANN, HIS WIFE.—June
1844.

Where no question is raised upon the admissibility as evidence of a paper read in the county court to the jury, this court, under the act of 1825, ch. 117, will not consider that question.

Where the defendant pleaded general performance, and after the plaintiff replied assigning a breach of the condition of a bond, the defendant rejoined generally, on which the issue was made up. This rejoinder under such circumstances can only be considered a general traverse of the plaintiff's replication. It only puts in issue the facts stated in the replication.

In an action on a testamentary bond, the equitable plaintiff claimed under a residuary clause in the will of *H*, executed in 1838, and admitted to probat in the same year, one-third of the residue of the testator's personal estate of which he might die possessed. Upon an issue denying the facts of the replication, the defendant gave in evidence an indenture made by the testator in the year 1832, conveying to his executor, the defendant, one-half of all his personal property of which he might die possessed, and which had also been admitted to probat by the orphans court as a testamentary paper of *H*. HELD: that the indenture was evidence, material, competent, and necessary to the finding of a proper verdict on the matters in controversy, as a part of the will of *H*.

This court, in reviewing the judgments of the county courts, cannot exercise the powers of a court of probat as to last wills and testaments of personal property.

When the orphans court admits two papers of different dates to probat as testamentary instruments of the same party, and holds that one is not a revocation of the other, this court will presume that the orphans court acted correctly, and not disturb their judgment when such papers are incidentally offered in evidence.

The orphans court may receive evidence of an error in the date of a will offered for probat.

Where the plaintiff assigned his breaches in a special replication, it is the duty of the defendant to rejoin specially, and a general rejoinder of general performance to such a plea, to give it any operation at all, can only be considered as a general traverse of the facts of the replication.

APPEAL from *Charles County Court*.

This was an action of *Debt*, commenced on the 13th January 1840, upon the bond of the appellants, executed 18th September 1838, with condition that *Walter W.* and *Henry M. Hannon*, should well and truly perform the office of execu-

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tors of *Walter W. Hannon, senior*, late of *Charles county*, deceased, according to law.

To the declaration on this bond, the appellants pleaded performance generally by the executors, and the plaintiff below replied, that the said *W. W. H.*, did in his lifetime, to wit, on the 16th day of May 1838, make, and in due form of law sign and execute his last will and testament in writing, in the words, letters and figures following, to wit :

In the name of God, amen. I, *Walter W. Hannon, Sr.*, of, &c. After my debts and funeral charges are paid, and after several devises of real and personal property, the testator proceeded as follows: *Item.* I also give and bequeath to my said daughter *Grace Ann Robey*, one-third part of my personal property, I die possessed of, and not otherwise willed or disposed of. *Item.* I give and bequeath to each of my grand children, *Francis Oscar* and *Martha Ann Hannon*, children of my son *William H. Hannon*, \$250, to be paid to them on their arrival to lawful age, and no more. And lastly, I do hereby constitute and appoint my two sons, *Walter W.* and *Henry M. Hannon*, my executors of this my last will and testament, revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other, to be my last will and testament. In testimony whereof, I have hereunto set my hand and affixed my seal, this 16th day of May, in the year of Christ 1838.

The replication, after setting out the probat of the will before the orphans court and certificate thereof, alleged that after making, signing, and executing the said last will and testament, the said *Hannon* died, at, &c., by which said will, *W. W. H.* and *H. M. H.*, were appointed executors thereof; by effect and virtue of which said last will, the said *Grace Ann* therein mentioned, who had previous to the death of said testator, intermarried with the said *William G. Robey*, was entitled to one-third part of the personal estate of the said testator, and one-fourth of the other two-thirds, as one of the heirs of said *Hannon*, the said *Walter W.* having died, leaving as his heirs and representatives, two sons, to wit, *Walter W.*, *Henry M.*,

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the said *Grace Ann*, two children of a deceased son, *William H. Hannon*, to wit, *Francis O.* and *Martha Ann Hannon*, each entitled to one-fourth part of said two-thirds, which remained after all legacies, bequests and charges by the said will before particularly and specifically devised, together with all debts due and owing from the said testator, and all necessary charges, expenses, allowances and disbursements upon the administration of the estate of the said testator, were paid, satisfied, discharged, and allowed to be paid and delivered to the said *Grace Ann*, by said executors. And the said state in fact saith, that on the 20th day of November, in the year 1838, in the county aforesaid, there remained in the hands of said executor the sum of \$7,035.26, clear personal estate, which was of the said *Walter W.*, after all payments, allowances, disbursements, specific and particular legacies and charges whatsoever, deducted to be paid and administered by the said executors as aforesaid, according to law, and the true intent and meaning of the said last will, of which sum of \$7,035.26, the said *William G. Robey* and *Grace Ann*, his wife, were and still are entitled to one-third, amounting to the sum of \$2,345.08 $\frac{3}{4}$, and to one-fourth of the residue or other two thirds, amounting to the sum of \$1,175.04 $\frac{1}{4}$, and in the whole to the sum of \$3,520.52, according to the tenor and effect of the said last will and testament. And the said state further in fact saith, that the said executors did not, to wit, at the county aforesaid, render any final, just and true account of and concerning their administration of the estate of the said *Walter W. Hannon, Sr.* to the justices for the time being, of the orphans court, to be examined and adjudged, and each parcel, part and portion of the said estate so owing and belonging to said *William G.* and *Grace Ann*, his wife, under and in virtue of the said last will and testament of the said *Walter W.*, and the laws of the land, and also pay and satisfy to the said *William G.* and *Grace Ann*, his wife, the said sum of \$3,520.-52, or any part thereof; and also that the said executors, although often thereunto required by the said *William G.* and *Grace A.*, his wife, did not pay or satisfy to the said *Wil-*

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liam G. and Grace A., the said sum of \$3,520.52, or any part thereof, but the same or any part to pay, or in any manner satisfy to the said *William G. and Grace A.*, his wife, the said executors have hitherto altogether refused, to wit, at, &c., all of which the said state is ready to verify; whereupon it prays, &c.

To this the defendants rejoined, that the said *W. W. H.* and *H. M. H.*, in the condition of the writing obligatory aforesaid mentioned, from the time of making the said writing obligatory aforesaid, have well and truly observed, performed, fulfilled and kept all and singular the matters and things to be done and performed, according to the condition of the said writing obligatory aforesaid, and did make a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said *Walter W. Hannon, Sen.*, deceased, in the condition of the said writing obligatory mentioned, and of this the said *Walter W. Hannon, Henry M. Hannon, Samuel H. Beall* and *Peter Dent*, put themselves upon the country.

On this rejoinder, the issue was made up, and the jury found a verdict for the plaintiff.

At the trial of this case, the plaintiffs to support the issues on their part joined, read in evidence to the jury, the will of *Walter W. Hannon*, and the probat thereof from a certified copy of the same, under the seal of the orphans court of *Charles* county; and also read to the jury, the inventory and accounts of the administrators of the personal estate of *Walter W. Hannon, Sen.*, also duly certified as aforesaid.

The defendants then read in evidence on their part, an instrument of writing, executed by the testator *Walter W. Hannon*, 8th September 1832, and proved that said paper had been admitted as a testamentary paper to probat, and recorded among the records of the *Orphans* court of *Charles* county.

This indenture made this 8th day of September, in the year of our Lord one thousand eight hundred and thirty-two, between *Walter W. Hannon, Sen.*, of *Charles* county, in the State of *Maryland*, of the one part, and *Walter W. Hannon, Jr.*, and *Henry M. Hannon*, sons of the said *Walter W. Hannon, Sr.*,

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of the county and State aforesaid of the other part, witnesseth: that the said *Walter W. Hannon, Sen.*, as well for and in consideration of the natural love and affection which he the said *Walter W. Hannon, Sen.*, hath and beareth unto the said *Walter W. Hannon, Jr.* and *Henry H. Hannon*, as also for the better maintenance, support, livelihood and preferment of them the said *Walter W. Hannon, Jr.*, and *Henry M. Hannon*, hath given, granted, aliened, enfeoffed and confirmed, and by these presents doth give, grant, alien, enfeoff and confirm, unto the said *Walter W. Hannon, Jr.* and *Henry M. Hannon*, their heirs and assigns, one-half of all my personal estate of which I may die possessed, to the only proper use and behoof of them the said *Walter W. Hannon, Jr.* and *Henry M. Hannon*, their heirs and assigns forever. In witness whereof I have hereunto subscribed my name and affixed my seal, the day and year first before written.

W. W. HANNON, (Seal.)

Signed, sealed and delivered in the presence of *Thomas Rogerson, Thomas L. Luckett*.

STATE OF MARYLAND, *Charles County, Sct*: On this 8th day of September, in the year of our Lord one thousand eight hundred and thirty-two, personally appears *Walter W. Hannon, Sen.*, party grantor, before the subscribers, two of the justices of the peace of the *State of Maryland* for *Charles county*, and acknowledges the said within deed or instrument of writing to be his act and deed, and the property therein mentioned to be the right and estate of *Walter W. Hannon, Jr.* and *Henry M. Hannon*, party grantees therein mentioned, their heirs and assigns forever, according to the true intent and meaning of the said deed or instrument of writing, and the acts of Assembly in such case made and provided. Acknowledged before and certified by

THOMAS ROGERSON,
THOS. L. LUCKETT.

STATE OF MARYLAND, *Charles County, Sct*: I hereby certify that the foregoing instrument of writing, is truly copied from one of the record books of the orphans court for *Charles county*.

The defendants then prayed the court to instruct the jury, that by the construction of said papers or instruments of writing, *Walter W. Hannon* and *Henry M. Hannon* were entitled to one-half of the balance of the personal property of the intestate, remaining after payments of debts and administration expenses, and that *Grace Ann Robey*, as legatee under the will of *Walter W. Hannon*, was only entitled to one-third of the remaining half, which instruction the court refused; but were of opinion and so instructed the jury, that the plaintiff was entitled to one-third of the balance of the testator's estate remaining after the payment of the testator's debts and the costs of the administration and commission to the executors and the legacies to the widow of the testator and to the children of *William H. Hannon*; to which instruction of the court (C. DORSEY, A. J.,) the defendant excepted.

The judgment being against the defendants, they prosecuted the present appeal.

The cause was argued before STEPHEN, DORSEY, CHAMBERS and SPENCE, J.

By CRAIN and ALEXANDER for the appellants, and
By W. H. TUCK for the appellees.

DORSEY, J., delivered the opinion of this court.

In support of the instruction given by the county court to the jury, as set forth in the bill of exceptions, it has been urged that the testamentary paper read by the defendants in evidence to the jury was inadmissible upon the pleadings and issues in the cause. Upon the admissibility of this paper as evidence, no question was raised in the court below, none can arise here under our act of Assembly of 1825, ch. 117; the evidence now objected to, went to the jury without objection. But had

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the objection been taken in the county court, it ought to have been overruled.

To this action upon the testamentary bond the defendants pleaded general performance ; to which plea the plaintiff replies and sets out in words, letters and figures, what he alleges to be the last will and testament of the testator ; and states that there remained in the hands of the executors, after all disbursements and payment of debts, legacies, &c., a balance of \$7,035.¹/₈, of which *Grace Ann Robey*, as legatee and distributee of the testator, was entitled to the sum of \$3,520.⁵/₈. To this replication the defendants, instead of rejoining specially as they ought to have done, put in a general rejoinder of general performance which, according to the interpretation given to such pleadings, in the loose and inartificial mode of pleading prevailing in the first judicial district of the State, means, if we give to it any operation, a general traverse of all the allegations contained in the replication. The rejoinder then puts in issue the facts, whether the paper recited was the only true and last will and testament of the deceased ; whether the balance of the testator's estate was as stated in the replication, and whether *Grace Ann Robey* was entitled to the portion thereof which she therein claims. On such issues, it surely cannot be denied that the testamentary paper read by the appellants, in evidence to the jury, was material and competent testimony, and necessary to the finding of a proper verdict, on the matter in controversy. But it has been insisted that this paper is inadmissible as evidence as a part of the last will and testament of the deceased, because bearing date in 1832, it is revoked and annulled by the revoking clause of the testator's will, exhibited by the plaintiff, which bears date in 1838. This argument would be entitled to great, if not conclusive weight, if urged before the orphans court, by which this paper was admitted to probat as part of the last will and testament of the deceased. Whilst sitting here reviewing the judgments of the county court, we cannot exercise the powers of a court of probat, as to last wills and testaments of personal property. What the orphans court has

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done upon this subject is conclusive upon this court, as far as concerns this question of express revocation. *Omnia presumuntur rite acta fuisse*, and for aught that appears to this court, it may have been satisfactorily proved to the orphans court that there may have been an error in date as to one of the testamentary papers admitted to probat, and that the one offered in the evidence by the defendants was of posterior execution; or that it was re-published by the testator after the sixteenth of May 1838.

Having sustained the paper offered in evidence by the defendants, as part of the last will and testament of *W. W. Hannon*, it is unnecessary for us to inquire how far this paper, if rejected as testamentary, would be operative as a deed of conveyance of one-half of the personal estate of which he might die possessed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

DECEMBER TERM, 1844.

STATE, FOR THE USE OF JOHN B. WELCH AND WIFE, *vs.*
CALEB M. JONES AND MORDECAI C. JONES, SURVIVORS
OF MARY E. FORD.—*December 1844.*

The confession of a judgment, to be released on payment of what F' shall say is due, cannot be considered as a reference under the act of 1778, ch. 21. It is a final judgment.

The various provisions of that act, all contemplate a case still pending in court, and awaiting the return of the award before a judgment is to be rendered.

The words *payment* and *due* in such a confession import that a sum of money, was alone in the view of the parties, and hence no other authority was given by it, but to certify the sum of money on payment of which the judgment should be released.

Under such a confession, the party who was to ascertain the sum has no authority to award or determine, that the judgment should be released on payment of, &c., in *negro property*, at the original appraisement, belonging to the estate of H.

APPEAL from *St. Mary's* county court.

State, use of Welch and wife, vs. Jones, et al.—1844.

This was an action of *Debt*, commenced on the 25th June 1839, by the appellants. The plaintiffs declared on the bond of *Mary E. Ford*, and the appellees sealed on the 14th June 1836, with condition the that said *M. E. F.* should perform the duties of administratrix of *Ignatius Ford*, deceased. The defendants pleaded general performance by *M. E. F.*

To which the plaintiffs replied—

1st. That before the making and execution of the writing obligatory aforesaid, to wit, on, &c., at, &c., at a county court begun, &c., on the first Monday of August in the year 1824, the State of *Maryland*, for the use of *Ignatius Ford*, then and there in his lifetime recovered against a certain *Caleb M. Jones*, in an action of debt then pending between the said parties in the said county court, as well the sum of three thousand pounds, being the penalty of a certain writing obligatory, then and there in such as aforesaid, a certain debt and the damages and costs in the said action, then and there assessed by the said court, to be released upon the payment of what *James Forrest* shall say is due, and costs; and then and there at the same court, the said State, at the like instance and request of the said *Ignatius* in his lifetime, recovered the same judgment with the same release thereof against *Mordecai C. Jones*; and then and there at the same court, the said State, at the like instance and request of the said *Ignatius* in his lifetime, recovered the same judgment with the same release thereof against *William Armstrong*, which said several judgments, then and there were of record in the said county court, and thereafter being in said court remaining, “the record thereof” was then and there by accident burnt and destroyed, and which said judgments yet remain in full force; and the said State in fact saith, that afterwards, to wit, on, &c., the said *James Forrest*, to whom the said judgments were so as aforesaid referred, did then and there make and file his award, and then and there did award and determine that the said annexed judgments be released on payment of \$1,016.52, in negro property, at the original appraisement, belonging to the estate of *Vitus G. Herbert*, deceased, with interest thereon

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from the 19th November 1824; and the said State, in fact saith, that before the making, executing and passing of the said writing obligatory by the said defendants, the said *Ignatius Ford*, then and there, to wit, on, &c., departed this life in said county, intestate, leaving a widow, the said *Mary E.*, and four children, to wit, *Harriet E.*, who afterwards intermarried with the said *John B.*, at whose instance this action is brought, *Lewis, Ann S. and Mark*, and leaving the said judgment and award, and other debts due, with other personal assets in said county to a large amount, to wit, twenty negroes of great value, to wit, the value of, &c., and a large sum of money, to wit, &c., due to the said *Ignatius*, in his lifetime, to be administered and distributed among the said widow and children. And the said State, in fact saith, that the said negroes, debts and money so due and owing, and belonging to the said *Ignatius*, amounting to a great value, to wit, the value of, &c., over and above, and after making all just allowances and deductions for debts, legacies and charges upon said personal estate, is by law to be distributed to the said widow, so that the said widow receive one-third part thereof, and each of the said children, one-fourth of the remaining two-thirds thereof, so that the said *John B. and Harriet E.*, in right of said *Harriet E.*, his wife, are entitled to one-fourth of two thirds of the said negroes and money, and other assets of great value, that is to say, of the value of three thousand dollars, current money. And the said State, in fact saith, that the said *Mary E.*, administratrix as aforesaid, did not collect and receive the said negroes and money, and other assets of the said *Ignatius*, and of which the said *Ignatius* died possessed and entitled. And the said State, in fact saith, that the said *Mary E.*, as administratrix as aforesaid, has not accounted for, distributed, or paid over to the said *Harriet E.*, while sole and unmarried, nor the said *John B. and Harriet E.*, his wife, since their intermarriage, but so to do, has wholly refused, &c.

2nd. That a certain *Ignatius Ford*, late of *Saint Mary's* county, deceased, departed this life, to wit, at, &c., intestate,

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leaving behind him a widow, the said *Mary E.*, and four children, to wit, &c. And the said State, in fact saith, that afterwards, and before the impetration of this suit, there was in the county aforesaid, a large amount of personal property of the said *Ignatius* then and there remaining in the said county, to be administered according to law; that is to say, twenty negroes of the value of five thousand dollars, and debts due the said *Ignatius*, of the value of five thousand dollars, which the said *Mary E.*, as administratrix as aforesaid, might and could have collected, received and administered according to law, the said *Mary E.*, well knowing the same. And the said State, in fact saith, that the said *Mary E.*, as administratrix as aforesaid, did not at any time return to the said orphans court, an inventory of the property and assets of the said *Ignatius*, deceased, nor make any settlements in said court; but afterwards, to wit, on the day and year aforesaid, returned a list of debts amounting to \$1,016, with interest from the 20th day of November 1824. And the said State, in fact saith, that the property, debts and other assets of the said *Ignatius*, deceased, amounted in the whole above, all payments and allowances for the debts, charges, &c., upon said estate, to a large sum of money, to wit, whereof the said widow was entitled to one-third, and the said *John B.* and *Harriet E.*, in right of said *Harriet E.*, one of the children of the said *Ignatius*, deceased, was entitled to, &c., of all which the said *Mary E.*, as administratrix, then and there had notice. And that the said *Mary E.*, as administratrix aforesaid, did not at any time distribute and pay over to the said *John B.* and *Harriet E.*, his wife, the said distributive share and proportion of the said estate and property; but so to do hath wholly refused, to the damage of the said *John B.* and *Harriet E.*, his wife.

3rd. That heretofore, to wit, on, &c., and before the impetration of the writ original in this cause, a certain *Ignatius Ford*, of the said county, then and there departed this life intestate, and leaving the said *Mary E.*, his widow and four children, to wit, &c.; that afterwards, and after the death of the said *Ignatius*,

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natus, the orphans court of *St. Mary's* county, then and there, to wit, on the day and year aforesaid, appointed the said *Mary E.*, &c.; that of the goods and chattels, rights and credits of the said *Ignatius*, there came in the hands of the said *Mary E.*, as administratrix as aforesaid, a large sum, to wit, to the value of ten thousand dollars, over and above all payments and discounts, which said sum was and is distributable and payable to the said *Mary E.*, widow, to the amount of one-third part, and to each of the said four children, one-fourth of two-thirds thereof. And that although the time limited by law for the settlement of estates by executors and administrators has long since expired, and in which the said *Mary E.*, as administratrix, was bound to settle and distribute the said estate, yet the said State, in fact saith, that the said *Mary E.*, as administratrix, hath not at any time settled, distributed or paid over the said sum of money, or any part thereof, to the said *John B. and Harriet E.*, his wife, and to the damage of, &c.

The defendants rejoined, that there was no such judgments as the said estate has thereon alleged, rendered in *St. Mary's* county court against the said defendants, or either of them, for the use of the said *Ignatius*, or against the said *William Armstrong*. And that the said *James Forrest* did not make and file his award in manner and form as the said State has above alleged; that since the last continuance, the said *Mary E. Ford* hath departed this life, to wit, on, &c., and without having received or recovered any of the said judgments, or any other sum of money alleged by the said plaintiff, to be due and owing to the estate of the said *Ignatius*, and that no letters of administration *de bonis non* on his estate had been sued out. And that the said *Ignatius* departed this life, leaving five children and heirs at law, and the said *Mary E. Ford*, his widow, and that he left no negroes or other assets to be administered as alleged by the said State, beyond the sum necessary to pay the debts of said estate, and that the said *Mary E. Ford*, in her lifetime, did return a true and perfect inventory of the estate of the said *Ignatius*, fully administered, the estate of the said *Ignatius*, and did and performed all the acts

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and things required by law to be performed by her as such administratrix. And that as to the said recited judgments and awards, that letters of administration were granted to the said *Mary E.*, on the estate of the said *Ignatius*, on the 14th day of June 1836, and that the said recited judgments first came to the knowledge of the said *Mary E.*, on the day of September 1836, and that the said recited judgments were barred by the statute of limitations, on the 13th day of November 1836, and so the said defendant avers, that in failing to collect the said judgments so alleged to be due and owing, the said *Mary E.* was guilty of no such laches as to entitle the said State therefor to maintain its said action. And that after the rendition of the aforesaid judgments, it was so proceeded in, in *St. Mary's* county court, sitting as a court of equity, in a case in which *Mary E. Ford* by *M. C. Jones*, her next friend, was complainant, and *Ignatius Ford* and the said *Caleb M.*, were defendants; that on the 18th day of March 1826, it was adjudged, ordered and decreed by said court, that the said defendant *Caleb M.*, should pay over to the said *Mary E.* for her own use, the amount of the said judgments so released, as alleged by the said plaintiffs, and that the said *Ignatius* should credit the said *Caleb M.* for the said amount, which said sum yet remains in full force unrecovered and of record in the said court; and all these things the said defendants are ready to verify.

The plaintiff sur-rejoined :—

1st. That there is no such record in *St. Mary's* county court, sitting as a court of equity, as by the defendants in manner and form in their rejoinder is alleged; and this the said State is ready to verify.

2nd, Says that the said *Mary E.* in her lifetime, did not well and truly perform, fulfil and keep the said matters and things by her to be done, performed and kept, according to the condition of the said writing obligatory, as she above alleged, and did not well and truly administer the goods and chattels, rights and credits of the said *Ignatius*, as the said defendants have above alleged; and this the said State is

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ready to verify, &c. On which sur-rejoinders issues were joined.

The verdict was for the defendants.

1ST EXCEPTION. The plaintiff, to support the issues on his part joined, gave in evidence to the jury, that *Harriet*, wife of the plaintiff, was one of the legal representatives of *Ignatius Ford*, on whose administration bond the present defendant was security, and then read in evidence to the jury the original inventory and list of debts due the estate of *Ignatius Ford*, returned by *Mary E. Ford*, her administratrix in her lifetime. An inventory of all the debts owing to *Ignatius Ford*, late of *St. Mary's* county, deceased, so far as they have come to the knowledge of *Mary E. Ford*, administratrix, viz:

C. M. Jones, administrator of *Vitus G. Herbert*, deceased, on special judgment bearing interest from 20th day of November 1824, to be paid in negro property, at the original appraisement, - - - - - \$1,016 52

Sworn to and filed 13th September 1836.

Having first proved that said list of debts was returned in the handwriting of *Caleb M. Jones*, the present defendant. The defendants having first proved the destruction of the original papers by fire in the destruction of the court house, then read in evidence, the docket entries of a case in *St. Mary's* county court, at August term of said court, in the year 1824, in the name of the State, at the instance and for the use of *Ignatius Ford* against *Caleb M. Jones*, *Mordecai C. Jones* and *William Armstrong*.

STATE OF MARYLAND, at the instance and for the use of *Ignatius Ford*, vs. *Caleb M. Jones*. *St. Mary's* county court, August term, 1824. Debt, Nar and Oyer. Spl. Impl. and leave. Perf. repl. Rejoinder and issue. List of outstanding claims. Jury sworn and withdrawn. Proceedings stayed by injunction. Plead. withdrawn.

Judgment 13th November 1824, for penalty and costs. To be released on payment of what *James Forrest* shall say is due, and costs. *James Forrest's* award filed 20th November 1824.

Test,

Jo. HARRIS, Cl'k.

Plaintiff's costs, \$12.85.

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STATE OF MARYLAND, at the instance and for the use of Ignatius Ford, vs. MORDECAI C. JONES. Same as preceding.

STATE OF MARYLAND, at the instance and for the use of Ignatius Ford, vs. WILLIAM ARMSTRONG. Same as preceding.

By which it appeared that a judgment was confessed in favor of the plaintiff for penalty and costs, to be released on the payment of what *James Forrest* shall say is due, and costs; and then gave in evidence the administration bond of the said *Caleb M. Jones*, on the estate of *Vitus G. Herbert*, dated 16th May 1820, with *M. C. Jones* and *W. Armstrong* as sureties.

And the said *Caleb M. Jones* was the administrator of *Vitus G. Herbert*; and then offered to read to the jury, for the purpose additionally of showing that the judgment returned by *Mary E. Ford*, administratrix of *Ignatius Ford* in 1836, in the handwriting of *Caleb M. Jones*, was the judgment referred to *James Forrest* in this case, and the award of *James Forrest*, filed in the case, on the 20th November 1824. An inventory of all the debts owing to *Ignatius Ford*, as above, and also the above short copies of judgments with the following certificates thereto annexed, viz :

I do award and determine that the annexed judgments be released on payment of \$1,016.52, in negro property, at the original appraisement, belonging to the estate of *Vitus G. Herbert*, deceased, with interest thereon from this 19th November 1824.

JAS. FORREST.

True copy,

JO. HARRIS, Cl'k.

The plaintiff then gave in evidence that *James Forrest* died in 1826.

The defendant then prayed the court to instruct the jury, that if they find from the evidence, that the debt returned in the list of debts by *Mary E. Ford*, as administratrix of *Ignatius Ford*, was the same in the judgment against *Caleb M. Jones*, recited in this bill of exception, then that the defendants are not responsible in this action for the same, because the award made by *James Forrest*, was not within the terms of the reference, and the sum upon which the judgment

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was to be released, was not legally arbitrated or liquidated by him. Which opinion the court (STEPHEN, C. J., and KEY, A. J.,) gave. The plaintiff excepted.

2ND EXCEPTION. The plaintiffs, upon the evidence incorporated in the first bill of exceptions, prayed the court to instruct the jury, that if they find from the evidence in the cause, that the judgment was entered for the debt, to be released on payment of what *James Forrest* shall say is due, and that *James Forrest* did make an award. And the award so made, was adopted by *Caleb M. Jones*, one of the defendants, that the said award so made by *Forrest*, to whom the judgment was referred, was binding upon *Caleb M. Jones*, and that the defendants are responsible for said debt, if they find that said debt was returned by *Caleb M. Jones*, one of the defendants in this cause, in his handwriting, and recognised by *Mary E. Ford*, the administratrix of *Ignatius Ford*; which instruction the court refused to give. The plaintiff excepted.

3RD EXCEPTION. In the trial of this cause the plaintiff, in support of the issues on his part joined, in addition to the evidence given to the jury in the former bills of exceptions, which is here incorporated and made a part of this, further offered to read in evidence from the records of the orphans court of *St. Mary's* county, the final account of *Caleb M. Jones*, (who is one of those defendants,) as administrator of *Vitus G. Herbert*.

The fifth and final account of *Dr. Caleb M. Jones*, adm'r of *Vitus G. Herbert*, late of *St. Mary's* county, deceased.

This accountant chargeth himself with the balance due at his last settlement, the 10th day of Novem-

1824, amounting to - - - \$372 71 $\frac{1}{2}$

Also with cash received from the following persons :

William Herbert, Sen.	-	-	-	\$961 00
John Clarke,	-	-	-	- 1 75
Thomas Clarke, Sen.	-	-	-	- 1 01 $\frac{1}{2}$
Nelson White,	-	-	-	- 1 50
Samuel Gibson,	-	-	-	- 4 00

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William Dunbar,	-	-	-	-	2 00
Lewis Smith,	-	-	-	-	50
Caleb M. Jones,	-	-	-	-	24 80½
					<hr/>
					\$1,369 29

And this accountant prays to be allowed for the following payments and disbursements, to wit:

Thomas Clarke,	-	-	-	-	\$25 83
Peter U. Thompson & Co., use W. Floyd, judgment,	-	-	-	-	148 45
Dr. Caleb M. Jones, for money due from Ignatius Ford for hire of negroes,	-	-	-	-	25 00
Same for property purchased by Mary Herbert at sale, one dark bay mare,	-	-	-	-	51 00
Ten per cent. commission allowed on \$996.57¼,					99 65
Register of Wills' fees to be paid James Forrest,					2 84
					<hr/>
					\$352 77
Balance due and distributable,	-	-	-	-	1,016 52
					<hr/>
					\$1,369 29

This account on the 19th November 1824, was sworn to by Dr. *Caleb M. Jones*, administrator of *Vitus G. Herbert*, as just and true, and that he hath bona fide paid or secured to be paid, the particular sums for which he claims an allowance, which thereupon, after due examination, is passed by the register of wills for *St. Mary's* county.

And also offered to prove by a legal and competent witness, that said *Mary E. Ford* lived in the family of said *Caleb M. Jones*, from the year 1822, until the time of her death; and also that said *Caleb M. Jones* paid fees against said *Mary E. Ford* after her death, which fees were due before her death, for the purpose of showing the indebtedness of said *Caleb M. Jones*, as administrator of *Vitus G. Herbert*, and that the balance in his hands of said estate, due and distributable, corresponds in amount with the award of *James Forrest* aforesaid, and the list of debts due to the estate of said *Ignatius*, as returned by his administrator aforesaid, and also for the purpose

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of proving that said *Caleb M. Jones* and said *Mary E. Ford*, as administratrix as aforesaid, acquiesced in the said award, and said *C. M. J.*, consented to pay the said sum of money to said *M. E. F.*, as administratrix as aforesaid; and prayed the court to instruct the jury, that if from the evidence they find that said *Caleb M. Jones* and *Mary E. Ford* did acquiesce in said award, and said *Caleb M.* did consent and agree to pay the said sum of money to said *Mary E.*, administratrix as aforesaid, that then the said plaintiff is entitled to recover his proportion of said sum of money; which opinion and instruction the court refused to give, but were of opinion, and so instructed the jury, that there was no legally sufficient evidence offered to prove that said *Caleb M. Jones* and *Mary E.*, did acquiesce in said award, or that said *Caleb M. Jones* did consent and agree to pay the said sum of money to the said *Mary E. Ford*. The plaintiff excepted.

4TH EXCEPTION. The plaintiff prayed the court to instruct the jury upon the whole evidence, that the award of *James Forrest* so returned, was valid and binding, as it does not appear from the papers in the case, that he exceeded his authority in designating the manner in which the sum ascertained should be discharged by the defendant; which instruction the court refused to give. The plaintiff excepted.

The plaintiff below appealed to this court.

The cause was argued before ARCHER, CHAMBERS and SPENCE, J.

By CRAIN for the appellants and

By T. S. ALEXANDER for the appellees.

CHAMBERS, J., delivered the opinion of this court.

The first exception involves the validity of the certificate, or as it is termed in the record, the award signed and returned by *James Forrest*.

This cannot be considered as a reference under the provisions of the act of 1778, ch. 21. The various provisions of that act, all contemplate a case still pending in court and

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awaiting the return of the award before a judgment is to be rendered ; whereas in this case, a judgment has been entered, which according to the case of *Turner vs. Plowden*, 5 G. & J. 52, is a final judgment, without the further action of the court. It would seem not to be possible in such a case to give judgment on the award, according to the direction of the act of 1778, ch. 21, sec. 8, without which the objects of that act cannot be attained. See *Shriver vs. State, use of Devilbiss*, 9 G. & J. 1. The words “payment” and “due” would seem to import, that a sum of money was alone in view of the parties, and we must conclude that no other authority was given to *J. Forrest* but to certify the *sum of money*, on payment whereof the penalty and costs should be released ; and then the question arises whether he has pursued the authority thus given? We think not. It is most obvious that the payment of any specific amount of money in specie would not be an execution of his direction. Payment is not only to be made in negroes, but in negroes belonging to a particular estate, and at a value estimated by a designated standard, and the plaintiff was not entitled to demand, nor could the defendant claim to discharge the debt in any other mode than the one mentioned in the certificate, and no execution could therefore issue. If instead of the judgment, a reference had been made in terms broad enough to authorise such an award, and a judgment had been entered thereon, all difficulty in that respect would have been removed. 9 G. & J. 1 ; 10 G. & J. 192. The object intended and directed by the certificate cannot be effected by striking from it so much as relates to the negroes, and allowing it to remain as if it had directed the payment of the specific sum of \$1,016.⁵/₁₀₀. Assuming the negroes to have been appraised at a fair value in 1820, when the administration bond on the estate of *S. G. Herbert* appears to have been given, and when we must suppose the appraisement and inventory were made, it was nearly, if not quite, impossible, the negroes could have remained of precisely the same value, until the letters of administration to *Mary E. Ford* in 1836, at the expiration of sixteen years, or at any later period ; and if there was any

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difference in such value at the time when the payment of the \$1,016.⁵²/₁₀₀, in money was enforced, either more or less would be paid than the certificate required, as the appreciation or depreciation of the negroes should determine. It was therefore necessary to the essential merits of the case, that the payment should not be required in money. Whether this be regarded as an award, or as in the nature an of award, we are of opinion, that upon principle or analogy, the certificate could not entitle the plaintiff to claim in money, the amount therein stated. We therefore concur with the court in the opinion given in the *first* exception, and also in the opinion given in the *fourth* exception, which raises the same question.

In the second exception, the plaintiff asked the court to instruct the jury, that the defendants were responsible for the nominal amount of the said certificate, if they should find that it was mentioned in the list of debts due to the estate of *Ignatius Ford*, returned by *Mary E. Ford*, the administratrix, and which return was in the handwriting of *Caleb M. Jones*. We are of opinion that the court were right in refusing the instruction. The claim is stated in the list of debts as payable in negro property at the original appraisement. The return is a report by the administratrix, *M. E. Ford*, of the fact that such a judgment existed, but we have before said it did not enable her to collect the amount of money mentioned in the certificate, and of course she was not responsible for that amount, as for so much money lost by her neglect.

The additional facts set forth in the third exception, do not in any degree relieve the case of the difficulties and objections which oppose the right of the plaintiff to recover upon this certificate the sum of money which he claimed in this action, nor indeed do we perceive how the administration account brought into the case, can be made to bear upon the issue.

Whether the balance stated to be due on that administration account, was due to *Ignatius Ford*, or was recoverable by his administratrix, or any portion of it, or to whom due, the record does not disclose. Finding no error in any of the opinions to which exception has been taken, we must affirm the judgment with costs to appellee.

JUDGMENT AFFIRMED.

State, use of Creecy, *vs.* Lawson et al.—1844.

STATE OF MARYLAND, FOR THE USE OF JAMES R. CREECY,
USE OF WILLIAM A. MOALE, *vs.* JOHN B. LAWSON, JOHN
MATTHEWS AND JOHN B. WILLS.—*December 1844.*

The courts of *Maryland* have, for a long period, sanctioned the abbreviated form of a return, *cepi*, by the sheriff, to the writ of *capias ad satisfaciendum*.

Such a return is in legal effect, a declaration by the sheriff on oath, that by virtue of the writ, he had taken the body of the defendant, and him had ready to produce before the court, at the time and place, as commanded by such writ.

The sheriff's return is *prima facie* evidence of the truth of the facts which it discloses.

In this State, anterior to the acts of 1811 *ch.* 161, *sec.* 2, if the sheriff made an arrest under a *capias* on final process, and suffered the party arrested to escape, he could not again arrest the same party, on the same process, without rendering himself obnoxious to an action of trespass for false imprisonment.

This disability was removed by that act, and the power conferred on the sheriff to make a second arrest, of the same party, by virtue of the same process. But it did not protect the sheriff against the demand of the plaintiff in the process for an escape.

The act of 1828, *ch.* 50, *sec.* 2, declared that if the sheriff produced the body of the defendant at the return day of the writ, he should not be liable for any intermediate escape. This act is not confined to arrests on *mesne* process, but applies to *final* process, attachment as well as *capias*.

Before the act of 1828, the sheriff on *mesne* process was authorised to arrest the defendant a second time; and the reason and policy of the law was by it extended to arrests on *final* process.

Where a sheriff arrests the defendant on *final* process, and has him ready to be delivered up at the return day of the writ, on the demand of the plaintiff, this in law is a performance of his duty.

In an action on a sheriff's bond, for an alleged permissive escape by the sheriff of a party arrested on a *ca. sa.*, which that officer had returned *cepi*, the plaintiff may show that such return is untrue in point of fact, and that the sheriff had not the body of the defendant in court, at the return day of the writ, ready to be delivered up on the demand of the plaintiff.

After an arrest under a *ca. sa.*, and a permissive escape before the return day has been proved, the burthen of showing, that the sheriff had the body of the defendant in court, according to the exigencies of the writ and his return of *cepi* thereto, is upon the sheriff.

In an action on the case at common law against the sheriff for an escape, he may offer evidence in mitigation of damages. The amount recovered against the party arrested, is not conclusive on that question.

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The statutes of 13 Edw. 1, ch. 11, and 1 Rich. 2, ch. 12, first gave the action of debt against a gaoler or sheriff for an escape.

Where the statutable remedy is pursued, the sheriff is put by the statute in the same situation in which the original debtor stood, and the jury cannot give a less sum than the creditor would have recovered against the defendant in the original suit.

The action on the sheriff's bond to recover damages for an escape, is neither the common law action on the case, nor the remedy granted by the statutes of *Edward* and *Richard*.

In an action on a sheriff's bond, conditioned for the faithful discharge of his duties, the defendant is liable to no more damages for an alleged escape under final process, than the plaintiff has actually sustained, to be ascertained by the verdict of a jury, and hence the sheriff and his sureties may show under such a breach, in mitigation of damages, the insolvency of the original defendant from the time of the issue of the ca. sa. until its return.

There are many instances in which, on the assignment or suggestion of breaches under the Stat. 8 and 9 Will. 3, the measure of damages is fixed and certain, but they arise from the peculiar circumstances of each case, and not from any general rule.

On a judgment by default in a suit on a sheriff's bond for an escape, the court would not assume the power of assessing damages and giving final judgment.

The act of 1768, *ch. 10, sec. 1*, enables any plaintiff in an execution to call upon the sheriff to produce the body of the defendant before the court, and on his default, on motion, to cause judgment to be entered up for the full amount of his claim, principal, interest and costs.

Where such a course is adopted, in an action on the sheriff's bond, assigning as a breach the non-payment of such a judgment, that officer and his sureties would be liable for the full amount of the judgment.

The act of 1768, *ch. 10*, is not merged in the act of 1794, *ch. 54*, but is now in full force and frequently practised under.

The failure of a plaintiff in a ca. sa., to call on the sheriff at the return of the writ to produce the body of the defendant in court, does not furnish any ground of presumption, in an action against the sheriff for a default, that the defendant was discharged out of the custody of the sheriff by the consent of the plaintiff.

The failure of a plaintiff to pursue one legal remedy against a sheriff in default, cannot be construed into the abandonment of another legal remedy against that officer, for the same default.

APPEAL from *Charles County Court*.

This was an action of *Debt*, commenced on the 13th March 1828, by the appellee on the bond of the appellants, dated 29th December 1835, with condition that *J. B. L.*, as sheriff of *Charles county*, should discharge the duties of that office.

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The defendants pleaded general performance, and the plaintiff assigned as a breach: 1st. The recovery of a judgment by *James R. Creecy* against *John Tucker*, at August term 1835 of *Charles* county court; the issue of a *ca. sa.* thereon on the 26th September 1836, returnable on the 3rd Monday of March 1837; the arrest and custody of *J. T.* under said writ, and his escape therefrom; and 2nd. A default in not returning the writ according to its command, though called, &c.

The defendants rejoined, that the said *John B. Lawson* has well and truly fulfilled and performed the duties of sheriff of the said county of *Charles*, and hath well and truly executed and returned all writs, process and warrants to him directed and delivered, which, according to the form and effect of the said condition of the writing obligatory aforesaid, he ought to have done, which they pray may be enquired of the country, &c.

1ST EXCEPTION. In the trial of this cause, the plaintiff, to support the issues on his part joined, read in evidence to the jury the record of a judgment obtained in *Charles* county court, as stated in the replication, and also the writ of *ca. sa.*, issued and returnable as before stated. On the back of which said writ of *capias ad satisfaciendum* is thus written, to wit: "*Cepi, John B. Lawson, sheriff.*"

And also gave in evidence to the jury, by legal and competent witnesses, that after the day of the issuing of the said *ca. sa.*, to wit, in October 1836, the said *John Tucker*, in the judgment and *ca. sa.* mentioned, was seen by the witness in and residing in *Charles* county aforesaid; that after the issuing of the said writ of *ca. sa.*, to wit, in February 1837, the said *Tucker* was seen at and was residing in *Vicksburg*, in the *State of Mississippi*. The plaintiff also gave in evidence that the said *Tucker* was seen and conversed with by plaintiff's attorney in December 1836, at *Annapolis*; and further gave in evidence to the jury, by legal witnesses residing in *Charles* county aforesaid, that they never saw the said *Tucker* in *Charles* county since *January* 1837.

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The defendant then proved, that the *March* term of *Charles* county court, commencing on the third Monday of March 1837, was continued over until the first Monday of June 1837, and that ample time, according to the usual course of communication and conveyance, existed for said *John Tucker* to come from *Vicksburg* to *Port Tobacco*, from the time he was last seen in *Vicksburg*, so as to be before *Charles* county court at *March* term 1837; and thereupon, the plaintiff prayed the court to instruct the jury, that if they find from the evidence that *John Tucker* aforesaid, was in *Charles* county after the issuing of the said *ca. sa.*, and before its return, to wit, in October 1836, and that the said writ was served upon him, and that afterwards, to wit, in *February* 1837, he was seen and residing in *Vicksburg*, in *Mississippi*, then, that the plaintiff is entitled to recover, unless the defendants prove to the satisfaction of the jury that the defendant, *Lawson*, the sheriff, had the body of the said *Tucker* before *Charles* county court, at *March* term 1837, to render him in execution for the debt before mentioned, according to the exigency of the said writ of *ca. sa.*; which instruction the court (C. DORSEY, A. J.) gave to the jury. The defendant excepted.

2ND EXCEPTION. After the evidence in the first bill of exceptions was given, which is also here incorporated, the defendants offered to prove to the jury by legal and competent witnesses, that at the time of the issuing the *ca. sa.* up to the time of the return thereof, the said *Tucker* was wholly insolvent and unable to pay the judgment and execution aforesaid, or any part thereof, for the purpose of mitigating the amount of damages which might be found by the jury in this action in favor of the plaintiff; but the court, upon the plaintiff's objection to the introduction of the said proof under the pleadings in the case, refused to permit the said proof, for the purpose aforesaid, to be given to the jury, and were of the opinion and so instructed the jury, that the sum recovered in the judgment above mentioned, with interest thereon up to the present time, with all costs awarded to the plaintiff in the said judgment, was the true measure of damages which the plaintiff was

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entitled to recover in this action, if they, from the evidence given in the cause, should find for the plaintiff; to which refusal and opinion and instruction, the defendant excepted.

3RD EXCEPTION. After the evidence already given in the former bills of exceptions, which is here incorporated, the defendants, by their counsel, prayed the court to instruct the jury, that it was incumbent upon the plaintiff to satisfy them by legal evidence, that the *ca. sa.* aforesaid had come to the hands of the said *Lawson*, as sheriff, and had been served upon the said *Tucker* before the said *Tucker* was seen in *Vicksburg*, and that the said sheriff had not the body of the said *Tucker* in his custody, so that he could have brought him at any time during the continuance of the March term 1837, before the court to be committed in execution, if called upon so to do.

The defendant also prayed the court to instruct the jury, that if they find from the evidence in the cause, that said *Tucker* was going at large and out of the custody of the said sheriff in December 1836, and the said sheriff was not called upon to return said *ca. sa.*, or have the said *Tucker* before the court, that then they may presume that the said *Tucker* was, by the consent of said plaintiff, discharged out of the custody of the said sheriff, and that the plaintiff, in that event, is not entitled to recover; which instruction the court refused to give. The defendant excepted.

4TH EXCEPTION. After the evidence in the previous bills of exceptions was given, which is here also incorporated and made a part of this exception, the defendant read in evidence to the jury the record of proceedings of *Charles* county court, at March term 1837, in the case aforementioned of *James R. Creecy* against *John Tucker*, upon the execution docket thereof, also the record of proceedings of said court at August term 1837, in the case aforementioned :

James R. Creecy, use of *William A. Moale*, vs. *John Tucker*. *Charles* county court, March term 1837. 2 *ca. sa.* "*Cepi.*"

James R. Creecy, use of *William A. Moale*, vs. *John Tucker*. *Charles* county court, August term 1837. August 22. On motion of plaintiff's attorney, rule on *John B. Lawson, Esq.*,

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late sheriff of *Charles* county, to produce the body of the defendant; motion overruled. Test,

JOHN BARNES, *Clk.*

And prayed the court to instruct the jury, if they find from the evidence in the cause that the said *Lawson*, the sheriff, was not called upon to return the said *ca. sa.* at March term 1837, and he was not called upon to have the body of the said *Tucker* before the said court at the said term, but that the said plaintiff forbore or neglected to call upon the said sheriff to return the said writ and have the body of the said *Tucker* before the said court, and afterwards, at August term 1837 of said court, did move the said court to compel the said sheriff to have the body of said *Tucker* before the said court, to be committed in execution, and that said court then and there refused to grant the said motion and order, that then they find for the defendants, unless they find that the *ca. sa.* aforesaid came to the hands of the said sheriff, and was served upon the said *Tucker* before he the said *Tucker* was seen in and residing at *Vicksburg*, and that the sheriff had not the body of the said *Tucker* in his custody at any time during the continuance of March term 1837 of said court, so as to bring him before the said court at that term, if called upon so to do; which instruction the court refused to give, and to which refusal the defendants excepted.

5TH EXCEPTION. After the foregoing evidence was given, mentioned in previous bills of exceptions, which is also here incorporated, the defendants by their counsel prayed the court to instruct the jury, that if they find from the evidence in the cause that the plaintiff refused or neglected to call upon the sheriff aforesaid to return the said writ of *ca. sa.*, and to have the body of the said *Tucker* before the said court, to be committed in execution, during the continuance of the March term 1837 of the said court, that then the plaintiff is not entitled to recover; which opinion and instruction the court (C. DORSEY, A. J.) refused to give; to which refusal the defendant excepted.

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The verdict and judgment being for the plaintiffs, the defendants prosecuted this appeal.

The cause was argued before ARCHER, CHAMBERS, and SPENCE, J.

By CRAIN and McMAHON for the appellants, and
By GLENN and ALEXANDER, for the appellees.

SPENCE, J., delivered the opinion of this court.

This was an action of *debt* on a sheriff's bond, brought to recover damages for an escape of a party, arrested by the sheriff on a *capias ad satisfaciendum*.

The *capias* was returned to the March term of *Charles* county court, by *Lawson*, the sheriff, endorsed, "*Cepi.*" The sanction of the courts of *Maryland*, so long, of this abbreviated form of return, we deem conclusive of its correctness. Let us next consider the purport of such a return.

We understand this return to be a declaration by the sheriff on oath, that, "by virtue of this writ, he had taken the within named *Tucker*, whose body he had ready before *Charles* county court within named, at the day and place within contained, as he was within commanded."

In the language of *Watson on Sheriff*, 68, "returns are nothing else but the sheriff's answers, touching that which they are commanded to do by the king's writ, and are but to ascertain the court of the truth of the matter."

"Credence is given to the return of the sheriff, so much so, that there can be no averment against the sheriff's return in the same action." "Even in another action, the sheriff's return is *prima facie* evidence of the facts contained in it." *Watson on Sheriff*, 52, 53.

Thus we see that the sheriff's return is *prima facie* evidence of the truth of the facts which it discloses. But it was insisted in the argument, that the strict requirements of the law, in relation to escapes, voluntary or otherwise, on the part of the sheriff on final process, was not modified by the 2nd section of the act of 1811, ch. 161, and the act of 1828, ch. 50.

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These acts, it is insisted, have application to attachments and *capias* on mesne process only. From this construction of these statutes we must dissent.

In *Maryland*, anterior to the act of 1811, ch. 161, sec. 2, if the sheriff made an arrest under a *capias* on final process, and suffered the party arrested to escape, he could not again arrest the same party on the same process, without rendering himself obnoxious to an action of trespass for false imprisonment. This disability the second section of the act of 1811, ch. 161, removed, by conferring the power on the sheriff to make a second arrest of the same party, by virtue of the same process. But this statute, while it protected the sheriff against the party so arrested a second time, did not protect him against the demands of the plaintiff in the process, for an escape. Thus the law stood until the act of 1828, ch. 50, which act, in all probability was passed in consequence of the case of *Koones vs. Maddox*, 2 *Harr. & Gill*, 106, which case was decided by this court at June term 1827, and the act of 1828, ch. 50, was passed at the next succeeding session of the Legislature. The statute of 1828, ch. 50, re-enacts the second section of the act of 1811, ch. 161, and in the second section of the act of 1828, ch. 50, there is this additional provision: "that, if such sheriff or officer shall produce the body of such person, so arrested, on the return day of such attachment or *capias*, or during the term of the court to which the writ is or may be returnable, then, and in such case, the said sheriff, or other officer, shall not be liable for any intermediate escape, &c." By what rule of construction this act is to be confined to arrests and returns on mesne process only, we are at a loss to discover. The language is any attachment or *capias*.

Finding no expression in the statute of 1828, ch. 50, which limits and confines it to a *capias* on mesne process, the letter and reason of the statute, and the policy of the law, making it as applicable to final, as mesne process, we can see no reason for such a construction; and what is conclusive, such was the law in relation to arrests on mesne process before the passage of the act of 1828, ch. 50.

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The return then of *cepi* by the sheriff, (if true in fact,) notwithstanding the party arrested had been seen going at large and residing at *Vicksburg* in February, provided the sheriff had him in his custody ready to be delivered up at the return of the writ, on the demand of the party at whose instance the *capias* was issued, was in law a performance of his duty, and exonerated him from liability in an action on his bond for an escape. But at the trial below, the plaintiff alleged that the return was not true in fact; that the sheriff had not the party so arrested in court; and offered evidence to prove that the return of the sheriff was not true, and upon the evidence thus submitted to the jury, prayed the court to instruct the jury, that they must find for the plaintiff, “unless the defendants proved to the satisfaction of the jury that the defendant, *Lawson*, (the sheriff,) had the body of the said *Tucker* (the party arrested on the *capias*,) before *Charles* county court at March term 1837, to render him in execution for the debt before mentioned, according to the exigency of the writ of *ca. sa.*” This instruction the county court gave, and we think, correctly gave.

The sheriff’s return was only *prima facie* evidence of the truth of the facts which it averred, and the plaintiff having offered proof admissible to the jury for the purpose of rebutting the *prima facie* evidence of the truth of the sheriff’s return, the court did right to give the instruction which they did give.

At the trial of the cause, the defendants offered to prove to the jury by competent witnesses, (for the purpose of mitigating the damages,) that *Tucker*, for whose escape the action was brought, was, at the time of issuing the *capias*, and so continued to be, insolvent and unable to pay his debts. To the admissibility of which testimony the plaintiff objected, and the court sustained the objection, and refused to permit the evidence for that purpose to go to the jury, and instructed the jury that the sum recovered in the original judgment, with interest thereon to that time, together with all costs, was the proper measure of damages which the plaintiff was entitled to recover, if they from the evidence should find for the plaintiff. To this refusal and instruction, the defendant excepted.

This instruction and exception present the question, whether in an action on the official bond of a sheriff for an escape of a party arrested by him on *capias ad satisfaciendum*, it is competent for him to offer in evidence any facts to mitigate the damages, and, whether the proper and only measure of damages is the amount of the judgment, interest, and costs, on which the *capias ad satisfaciendum* issued?

It is settled by authority, that, in an action on the case for an escape at common law, it was competent for the defendant to offer such evidence for such a purpose. *Vide Sel. N. P. 504, tit. Debt*, for this position.

This was the only remedy a plaintiff had at common law, until the statute of *West. (13th Ed. 1, ch. 11.)* and *1 R. 2, ch. 12.* These statutes first gave the action of debt against a goaler or sheriff for an escape. Where this remedy is employed under the statutes, the sheriff is put in the same situation in which the original debtor stood, and the jury cannot give a less sum than the creditor would have recovered against the defendant in the original suit.

This is the penalty which the statutes referred to, annexed to such a default on the part of the sheriff. But the remedy employed in this case is neither the action on the case at common law, nor of debt under the statutes of *West. & Richard*; but an action of debt on a bond with a collateral condition, for the faithful discharge of official duties as sheriff. The bond, it is true, is a statutory bond, but the remedy on the bond is the common law remedy of action of debt on a bond with a penalty.

At common law, where judgments were rendered on such bonds, they were for the penalty, and the plaintiff could take out execution for the same, although the penalty far exceeded in amount the damages which he had sustained by the breach of the condition of the bond.

The only relief which a defendant could have was from the interposition of a court of equity, which would direct an issue of *quantum damnificatus*, and prevent an execution being enforced for more than the actual damages. To remedy this

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hardship and to avoid this circuitous mode of relief to which defendants thus situated were driven, the Stat. 8 and 9 *William* 3, *ch.* 11, was enacted. This statute has been adopted in *Maryland*, and this case being within the equitable provisions of the statute, the defendant is liable to no greater damages than the plaintiff has actually sustained, to be ascertained by the verdict of a jury under *the 8th sec. of the 11th ch. of the stat.* 8 and 9 *William* 3; *Perkins et al vs. Giles, governor*, 9 *Leigh's R.* 397.

We cannot see the force of the argument of the appellee's counsel, which insisted that the judgment and costs on which the writ of *ca. sa.* issued, was the only measure of damages, and which could not be mitigated by any testimony; or in other words, that any evidence for such purpose was inadmissible.

The object of the statute which requires the sheriff's bond and prescribes its condition, was to provide more ample security to all persons interested in its faithful performance; not to increase his obligations, or to render a more summary redress for his defalcations, than existed by action on the case at common law, and therefore not to conclude him from any defence which he had in that action.

If, in a suit before the bond was required, actual damages only could be recovered, unless the action, under the statutes of *West.* 13 *Ed.* 1, *ch.* 11, and 1 *R.* 2, *ch.* 12, was adopted, why should the amount to be recovered be different after the bond? A suit on the bond is no more a pursuit of the remedy prescribed by the statutes, than was the action on the case.

The argument derived from the fact, that, in certain cases the damages are certain, and must be measured by a certain standard, does not prove that such must be the case here. There are many instances in which, on the assignment or suggestion of breaches under the statute 8 and 9 *William* 3, the measure of damages is fixed and certain; but they arise from the peculiar circumstances of each particular case, not from any general rule, which can be applied to this case in common with them, and where no such particular reason exists for the exact measure of damages, the party can only recover what

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the jury shall believe he may have actually sustained, after a full investigation of all the facts.

There are also cases referred to, in which the court will assess the damages without requiring the forms to be pursued which the statute 8 and 9 *William 3*, prescribed, in assigning breaches, and the cases of bail bonds, and others, have been instanced. But it will hardly be contended, that on a judgment by default in a suit on a sheriff's bond for an escape, the court would assume the power of assessing damages, and giving final judgment, assuming that the cases respecting bail bonds, &c., are recognised as the law and practice of the courts in *Maryland*, which we by no means intend to assert.

There appears to be less reason for considering the plaintiff necessarily entitled to recover in this action the full amount of his debt, because there is a perfect remedy afforded him by the act of 1768, ch. 10, sec. 1, which enables any plaintiff in an execution to call upon the sheriff to produce the body of the defendant before the court, and on his default, on motion to cause judgment to be entered up for the full amount of his claim, principal, interest, and costs.

If the plaintiff had thought proper to adopt this remedy he could have had his remedy on the bond, and on assigning as a breach the non-payment of such a judgment against the sheriff the securities would clearly be liable for the full amount, as in such case the judgment against the sheriff would be the proper measure of damages; and as the plaintiff in this case has forborne to pursue this mean of redress, he cannot complain. It has been erroneously supposed this act of Assembly was merged in that of 1794, ch. 54. This act is now, and always since its passage, has been in full force and frequently pursued in practice.

By the decision on the first bill of exceptions, it has been determined that it was incumbent on the defendant to shew that he had the body of *Tucker* before *Charles* county court at March term 1837. The first instruction of the third prayer could not therefore be granted.

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We also think the court were right in refusing the second instruction in the third prayer; for, although the sheriff may not have been called on to return the *ca. sa.* against *Tucker*, such failure on the part of the plaintiff would furnish no ground for any presumption that the defendant was discharged out of the custody of the sheriff by the consent of the plaintiff. The failure of the plaintiff to pursue one legal remedy against the sheriff, could not upon any sound principle be construed into an abandonment of another, or into a consent to *Tucker's* discharge.

We think our reasoning and conclusions are alike applicable to the fourth as the third exception.

We concur with the county court in the *fifth* exception. The instruction therein asked, if granted, would make the sheriff's return, whether true or false, conclusive.

The case is therefore reversed on the *second* exception, and procedendo awarded.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

CEPHAS R. BENSON vs. RICHARD BOTELE. — Dec. 1844.

The condition of B's bond of the 30th May, 1835, recited, that in consideration of \$500, and three promissory notes amounting to \$500, he would convey to R. a certain house and lot, when all the conditions of his bond should be complied with—at the foot of this bond was a receipt for \$500: another paper signed by B., dated in 1841, certified, that he had taken back the house and lot, for the same amount of money which R. agreed for and purchased of him, and "feel myself bound for the same amount." R. took possession of the house in 1835; and remained there until 1840; the rent of which was worth \$90 per annum. In an action brought upon the agreement of 1841, to recover the \$500, HELD: that the defendant was bound to return to the plaintiff the amount, if any, which the jury should find was paid by him to the defendant, under the contract of 1835; that the value of the use and occupation was not to be deducted from such sum; and that the contract of 1841 was a re-purchase.

The possession by the plaintiff of a paper signed by the defendant, and on which the former had brought an action at law, is sufficient evidence from which the jury might find it to be the agreement of the parties.

Benson vs. Boteler.—1844.

APPEAL from *Prince George's* county court.

This was an action of *trespass upon the case*, brought on the 18th May, 1842, by the appellant against the appellee.

The plaintiff declared upon the sale of the house, &c., and the agreement of the defendant to take the property back, and a special assumpsit to repay, as mentioned in the bill of exceptions. The defendant pleaded *non assumpsit*, on which issue was joined. The verdict was for the plaintiff.

At the trial of this cause, the plaintiff to maintain the issue on his part, read to the jury the following papers, to wit :

“ Know all men by these presents, that I, *Cephas R. Benson*, of &c., am held and firmly bound unto *Richard Butler*, in the full and just sum of two thousand dollars, current money of the United States, to be paid to the said *Richard Butler*, his heirs or assigns, for which payment well and truly to be made and done, I, the said *C. R. B.*, bind myself, my &c. Sealed with my seal and dated this 30th May, 1835.

The condition of the above obligation is such, that if the above bound *C. R. B.* shall, for and in consideration of \$500, as aforesaid, paid in hand, and one promissory note of the date aforesaid, payable two years after the date aforesaid, for \$166.66 $\frac{2}{3}$, with legal interest thereon from the date aforesaid, until paid, and one promissory note payable in four years from the date aforesaid, for \$166.66 $\frac{2}{3}$, with legal interest thereon, until paid, as aforesaid, and one promissory note for \$166.66 $\frac{2}{3}$, payable in six years from the date aforesaid, with interest thereon as aforesaid, then the said *C. R. B.* shall convey unto the said *R. B.*, a certain house and lot by good and sufficient deed, lying and being in the town of *Queen Ann*, in &c., containing one acre of land, more or less, and generally known as *Sparrow's Tavern*, when all the conditions of this bond or obligation are complied with ; then this obligation to be void and of none effect, otherwise, of full force and virtue in law.

CEPHAS R. BENSON, (Seal.)

Witness, *John Claytor*.

Queen Ann, May 30th, 1835. Received of *Richard Butler* the sum of five hundred dollars, the same being the cash payment mentioned in the annexed bond. *C. R. B.*”

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And proved the same to be in the hand writing of the said defendant; and also read to the jury the following paper, to wit:

“I hereby certify, that I have taken back the house and lot in *Queen Ann* for the same amount of money which *Richard Butler* agreed for, and purchased of me, and feel myself bound for the said amount. Given under my hand and seal this 24th day of August, 1841.

C. R. BENSON.

Test,—S. H. B.”

And proved the same to be in the hand writing of the defendant.

The defendant then proved to the jury, that the plaintiff *R. B.*, took possession of the said house and lot mentioned in the said bond of conveyance, on or about the date thereof, and remained in the possession thereof until the year 1840. And then proved to the jury, that the sum of ninety dollars was the fair and reasonable value of the said house and lot per annum, from the said 30th April, 1835, to the said year, 1841.

Thereupon the defendant prayed the court to instruct the jury, that if they find from the evidence in the cause, that from the time of the contract of sale from defendant to plaintiff in 1835 to the year 1840, the said plaintiff was in the possession of the said house and lot, or received the rents and profits thereof under the aforesaid contract of sale, that then by the legal construction of the agreement or instrument of writing relied on and declared upon in the present action, the plaintiff is only entitled to recover the difference in his favor, if any, between the original cash payment of five hundred dollars, and the value of the use and occupation of the said house and lot for the time it was so sold by the plaintiff; which opinion and instruction the court (*STEPHEN, C. J.*) refused to give; but were of opinion and so instructed the jury, that by the legal construction of said instrument of writing, the defendant was bound to refund to the plaintiff the amount, if any, which the jury shall find was paid by him to the said defendant for said house and lot, provided they find the con-

tract of August 1841 to have been made between the parties. To which opinion of the court as given to the jury, and to their refusal to grant the defendant's prayer, the defendant excepted.

The defendant appealed to this court.

The cause was argued before ARCHER, CHAMBERS, SPENCE, STONE and SEMMES, J.

By TUCK for the appellant, and

By PRATT for the appellee.

STONE, J., delivered the opinion of this court.

The county court having referred to the jury the evidence offered of the facts, that the paper of August 1841, was the agreement of the parties; that is, that the paper was made and delivered by the defendant, and accepted and assented to by the plaintiff; and also, the amount of money to be paid by the defendant to the plaintiff, and predicated their opinion upon the hypothesis that these facts might be found by the jury, proceed in the instructions given to construe the paper of August 1841 as a memorandum of an agreement between the parties for a re-purchase of the same property at the same price it had been in 1835 contracted to be sold by the defendant to the plaintiff, and therefore, that the amount to be refunded was subject to no abatement for the value of use and occupation while held under the first contract.

It is insisted, that by the true construction of this paper of August 1841, it is only an agreement to rescind the contract of 1835, and that when the money paid upon a rescinded contract is sought to be recovered back, an abatement or deduction is to be made from that amount, for the value of use and occupation while the property was held under the contract of sale. It is further insisted, that there was no legally sufficient evidence offered, tending to prove the paper of August 1841 was the agreement of the parties, and therefore, the finding of that fact ought not to have been submitted to the jury.

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In construing written instruments, the first and chief object is to ascertain the meaning of the parties, and the intention as expressed, unless contravening some rule of law, is to be carried into effect, 9 *Gill & John*. 77. The paper of August 1841, referring to the contract of 1835, to ascertain the amount and designate the property, and declaring an agreement had been made to take back the same property, contracted to be purchased in 1835, at the same amount paid at that time, shows clearly that the first contract of sale was not rescinded, but that a new contract to purchase back the same property at a fixed price had been then made, to take effect from its date. The first contract stood in full force until the agreement of August 1841 was made, and all the rights acquired under the contract of 1835 remained unimpaired up to August 1841. The use and occupation of the property so contracted for in 1835, was a right thereby acquired; he could not, therefore, be liable to the defendant for the value of such use and occupation.

As to the second objection, after the opinion above expressed, it is only necessary to say that the paper of August 1841, being proved to have been signed by the defendant, the possession thereof by the plaintiff and, pursuit of his remedy thereon, was sufficient evidence from which the jury might find it to be the agreement of the parties. The possession of the obligee in a bond is evidence of its delivery, 1 *H. & J.* 323. This agreement contains an obligation on the part of the defendant to pay the same amount of money which had been received by him on the contract of 1835. It also states the consideration for this obligation. The consideration being the taking back from the plaintiff the property contracted to be sold to him in 1835, the inference is irresistible, that the payment was to be made to the plaintiff: he therefore stands in the same attitude as an obligee in a bond, and it would have been error in the court to take from the jury a fact of which there was evidence legally sufficient offered, 10 *G. & J.* 346. Concurring in opinion with the county court, we affirm the judgment.

JUDGMENT AFFIRMED.

State, use of Holton, vs. Burke, et al.—1844.

THE STATE, USE OF JOHN HOLTON, vs. GARRET BURKE, JOHN DULANY AND BENEDICT I. FENWICK.—*December 1844.*

By the act of 1834, ch. 336, (passed 21st March 1835,) any surety for the appearance of an insolvent petitioner is authorised to bring him into court, or before any judge thereof, as special bail may bring their principal into court, and when brought in, to surrender and commit him, provided that he be so surrendered before or at the first term to which suit shall be brought upon the bond for the appearance of such petitioner. **HELD :**

1. That such bonds are now assimilated to bail bonds.
2. That the surety of such insolvent petitioner may surrender him at or before the *first term* of suit brought on such appearance bond.
3. That the act applied to a bond executed on the 12th March 1835, the condition of which was not broken at the date of the passage of the act of 1834, ch. 336, and modified the remedy thereon.
4. That the surety is only called upon to exert his privilege under the act of 1834, after he is sued.

APPEAL from *St. Mary's County Court.*

This was an action of *debt*, commenced on the 19th September, 1839, by the appellants, who declared upon the bond of the appellees, dated the 12th March, 1835, containing the following recital and condition :

“Whereas the above bound *Garret Burke* hath obtained his discharge from the common jail of *St. Mary's* county, by virtue of the provisions of an act of the General Assembly of the State of *Maryland*, passed at November session, eighteen hundred and five, entitled, an act for the relief of sundry insolvent debtors, and the several supplements thereto. Now the condition of the above obligation is such, that if the above bound *Garret Burke* do, and shall well and truly make his personal appearance at the county court, to be held at *Leonard town*, in and for *St. Mary's* county, on the *first Monday of August* following the date hereof, before the judges of said court, from day to day, and not depart therefrom without leave of the said court first had and obtained, and do and shall make his personal appearance at all such other times and places as shall by the said court be directed and appointed, then this obligation to be void and of none effect.”

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The defendants pleaded general performance of the condition of the bond, and the plaintiff replied, that the said *Garret Burke* did not make his personal appearance before the judges of, &c., at August term of *St. Mary's* county court, held on the first Monday of August, 1835, according to the condition of his bond; nor at March court, 1836, although so required to do by order of said *St. Mary's* county court; nor at March court, 1838; nor at August court, 1838; nor at March court, 1839; although so required to do by order of *St. Mary's* county court; to which said several terms of *St. Mary's* county court, the petition of the said *Garret* was continued, and his appearance required by the orders of the said court passed in the premises, which will more fully appear by reference to the records of said court, now in said court remaining, as by the condition of the said writing obligatory, he was required to do; whereupon the said State avers, that the said *Garret Burke* has not done all and every thing he was required to do and perform by the condition of the said writing obligatory; and the said State further saith, that at *St. Mary's* county court, held at *Leonard town* on the first Monday of August, 1837, a certain *Thomas Jones*, by judgment of the said court, recovered against the said *Garret Burke* and *John Holton*, survivors of *Thomas R. Johnson*, the sum of, &c.; which said judgment, the said State avers, was for a debt due before the execution of the said writing obligatory; and the said State further avers, that the judgment aforesaid, was rendered against the said *Garret Burke* and *John Holton* as co-securities of the said *Thomas R. Johnson*, and that the said *John Holton*, at whose instance and for whose use this suit is instituted, paid and satisfied the whole of said judgment, and the same is assigned to his use; and, except by him, the said judgment remains in *St. Mary's* county court no way satisfied or reversed; and this, the said State, is ready to verify: wherefore the said State prays judgment for the debt aforesaid, and damages to the said State for the detention of that debt, to be adjudged, &c.

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The defendants rejoined, that at the first term to which they were sued, to wit, the *March* term of *St. Mary's* county court 1840, the said defendants delivered up the said *Garret* in discharge of the liability on the said bond under the provisions of the act of Assembly in such case made and provided, and that the said *Garret* was so surrendered in court, and by order of the court, and on the 2nd day of March 1840, committed to the custody of the sheriff, and this the defendants are ready to verify; wherefore, &c.

The plaintiffs demurred generally to the rejoinder, in which the defendants joined, and the parties agreed that all errors in pleading shall be and are hereby released.

The county court rendered judgment on the demurrer for the defendants, and the plaintiffs below prosecuted this appeal.

The cause was argued before ARCHER, CHAMBERS, SPENCE and STONE, J.

By CRAIN for the appellants, and
By ALEXANDER, for the appellees.

STONE, J., delivered the opinion of this court.

The question presented upon this appeal is whether the surrender by the securities of *Burke*, the principal in the bond, and his commitment to the sheriff by order of *St. Mary's* county court, is such performance of the condition of said bond, as discharges the securities from its liability.

According to the provisions of the acts of Assembly of this State for the relief of insolvent debtors prior to 1834, a petitioner for the benefit of these laws might be compelled to give bond, with security, for his appearance before the court of the county in which the petition was filed, or the commissioners in *Baltimore* city, as the case might be, at a time specified; and give notice to creditors of his application, as to enable them to resist, if they saw fit, his final discharge; and in case the final discharge was successfully resisted, the petitioner being present in court, his creditors might have such remedies affecting his personal liberty, as are provided by law.

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The object and character of these bonds have been assimilated to bail bonds; if the petitioner failed to appear at the time specified, the bond was forfeited, and his securities became bound to each creditor for the amount of his claim. This was found to press with rigor upon securities, who were like bail, bound for the appearance of the principal in the bond, but had none of the power to relieve themselves which bail enjoyed, until by the act of 1834, the legislature passed an act for their benefit, and thereby gave similar power and authority to the securities which special bail had, to surrender the petitioner at any time at or before the first court to which suit was brought upon the bond. This act was passed before a breach of the condition of the bond in this case had occurred. The right of the creditor to sue did not attach until the petitioner had failed to appear according to the condition of the bond, and the remedy upon the bond was subject to be controlled and modified by the provisions of the above mentioned act of Assembly.

The facts alleged in the rejoinder being admitted by the demurrer, and all errors in pleading being by consent released, it is evident, that the surrender by the securities of the petitioner, and the order of court committing him to the custody of the sheriff, are within the provisions of the act of Assembly, and the securities are entitled to the benefits thereby provided for them. They have proceeded according to the power and authority conferred, and so far as the act is directory to the court, "*omnia rite acta præsumentur*," and although years had elapsed after the time specified in the condition of the bond for the appearance of the petitioner, and although he did not in fact appear, yet this lapse of time is attributable to the creditor in not pursuing his remedy, and when at the first court suit was brought upon the bond, the petitioner was surrendered, he had all the remedies affecting the person of the petitioner provided by law. He is therefore not injured, and has no cause of complaint.

JUDGMENT AFFIRMED.

Brooke, et al. *vs.* Berry.—1844.

ROBERT W. BROOKE, AND MARY ANN HIS WIFE, AND OTHERS,
vs. WILLIAM F. BERRY.—*Dec.* 1842.

A conveyance obtained by a general agent from his principal, will be vacated for fraud in its obtention; or, because of the principal being a man of such feeble intellect, as to be incompetent to the management of his own business; or in consequence of the terms being so unjust and unequal, as therefore to be unconscientious.

Exceptions to proof taken under a commission, will not avail the party making them, where the only tendency of the proof excepted to, is to establish facts admitted in the defendant's answer, or satisfactorily proved by other testimony which stands exempt from all objection.

A general exception to all the testimony taken under an *ex parte* commission, on the ground that it was vacated and set aside by an order of court rescinding an interlocutory decree, to let in a defendant's answer, cannot be sustained, when the proof was taken prior to the rescision of such decree.

The act of 1820, ch. 161, sec. 3, provides, that the filing of an answer, after an interlocutory decree is rescinded under that act, shall in no case affect the validity of any commission previously issued to take testimony, or the proceedings under it, or of any testimony previously taken and returned under any such commission: the efficacy of the proof is the same, whether previously or subsequently returned into court.

Notice of the execution of an *ex parte* commission, under the act of 1820, need not be given to the defendant. He has no power, either to offer proof under such commission, or to cross-examine the complainant's witnesses.

Where a deed to a party is impeached as fraudulent, he cannot offer evidence of his good character and general upright conduct, in support of such deed.

The feeble intellect of a grantor; the relation of principal and general agent between him and the grantee; inadequacy of price for land conveyed by such a grantor to such a grantee; are all circumstances calculated to impeach a deed, as constructively fraudulent.

Where there is great contrariety of evidence as to the feebleness of a grantor's intellect, as twelve witnesses for it and nine against it, the admission of his grantee, his general agent, that such grantor was incapable of transacting his own business, will corroborate the affirmative of that issue.

Such evidence is sufficient to control a defendant's answer, denying the fact of mental incapacity.

The effect of the averages of witnesses as to value of lands and rents, stated and discussed.

The value of land ascertained by considering its annual rents, as equal to five *per centum* on such value.

Gifts procured by agents, and purchases made by them from their principals, should be scrutinized with a close and vigilant suspicion.

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Agents are not permitted to deal validly with their principals in any case, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.

Circumstances in the conduct, action and life of a grantor, stated and discussed, from which a court of equity will infer his mental imbecility, or, that undue influence had been exercised towards him by his general agent.

Where a general agent obtains from his principal a conveyance of lands at a price greatly below their value, this will, of itself, induce a court of equity to set aside the contract; unless it appeared to have been entered into, in a way and under circumstances, that there had been no abuse of confidence, no undue influence, no imposition, or material concealment practised by the agent on his principal, which could cast a shade of doubt as to the fairness and honesty of the transaction.

In valid contracts between principal and agent, the parties should meet on equal terms; and the agent is bound to protect the interest of his principal, with the same care and circumspection, that he would his own; if he does not thus deal with his principal, his contracts with him are tainted with suspicion, and will be set aside.

Where a court of equity vacated a conveyance of land from a principal to his general agent, on the ground of constructive fraud, and of which land the grantee had possession, and decreed a sale of the premises, it also decreed an account between the parties, in which the grantee was to be charged with the rents and profits of the land, and credited for his improvements thereon, during the time he held and enjoyed the lands, under his alleged purchase; and with all sums by him *bona fide* paid, on account of his principal, or which should be justly due and owing from him to his agent.

APPEAL from the Court of Chancery.

The bill in this cause was filed on the 27th January, 1841, by *Elisha Berry*; *Robert W. Brooke* and *Mary Ann*, his wife; *Louisa*, *William*, *Nancy* and *Eliza Berry*, (the three last named being infants,) and alleged, that the said *E. B.*, who is the father of all the other complainants, except the said *R. W. B.*, being seized and possessed of considerable property and estates, both real and personal, lying, &c.; and being naturally of a feeble and weak mind and intellect, and therefore, incapable of managing the same with profit or advantage to himself and family, or to take care thereof, or to transact business generally with prudence, or even safety, was induced on or about the 7th May, 1836, by the artful persuasion and management of a certain *William F. Berry*, the defendant,

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and who is the natural brother of the half blood of the said *Elisha*, in whom he had the most unlimited confidence, and who possessed the most unbounded influence over him, to commit and entrust to him, the said *W. F. B.*, the sole and exclusive charge, management and control, of all of the said property; and made and constituted him the agent for the transaction of all the business concerns of him, the said *E.*, whatsoever. That in virtue of the confidence thus reposed in him, and the authority and power so conferred on him by the said *E.*, as his agent, the said *W. F. B.* continued to manage and control the property of the said *E.*, as aforesaid, from the period of time above stated, until about the 24th February, 1840; when the said *E.* having just grounds to apprehend and believe that the said *W. F. B.* had greatly abused the confidence he had reposed in him, and was seeking to enrich himself at the expense of, and out of the substance and property of the said *E.*, he determined to revoke the agency which he had conferred on the said *W. F. B.*, as aforesaid, and to withdraw the said property from his management and control, which was accordingly done; that the numberless impositions which before this time had been practiced upon, and the advantages which had been taken of the said *E.*, in relation to his said property, as well by the said *W. F. B.* as by other persons, rendered it then but too apparent and evident, that the said property was altogether insecure, and would be wholly lost to the said *E.* and his aforesaid children, by the fraudulent and artful contrivances of any who might be disposed to take the advantage of or deceive him, if the said property were suffered to remain in a situation in which it could be bound or affected by his acts or contracts. That the said *E.*, himself, was finally convinced of this, and being disposed and minded to provide for his said children, as also to secure support for himself in after life, did, on or about the 24th February, 1840, execute and acknowledge in due form of law, a certain deed or indenture in writing, whereby he conveyed to the said *Robert W. Brooke*, who had before that time intermarried with the said *Mary Ann*, one of the daugh-

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ters of the said *E.*, all his property of every description whatsoever, in trust for the use of his said children ; and he the said *E.*, to be well supported out of the same as long as he should live. All of which will more fully and at large appear, reference being had to an authenticated copy of the said deed, which is herewith filed, marked *A.*, as a part of this their bill of complaint ; that soon after the execution of this deed, the said *R. W. B.*, the trustee therein named, and the husband of the said *M. A.*, the oldest child of the said *E.*, called on the said *W. F. B.*, who, on his having been appointed by the said *E.* as his agent, aforesaid, had taken possession of, and gone to reside on an estate of the said *E.*, composed of the following parcels of land, in the said deed specified, to wit: "*Chileno Castle*" and "*Belfast*," or, "*Addition to Charles' Gift*," and "*John's Choice Diminished*," and continued to reside thereon, at that time, and apprized him of the execution of the said deed, and in virtue thereof, demanded of him, the said *W. F. B.*, a surrender of the possession of the land of which he had thus possessed himself; but this the said *W. F. B.* refused to do, informing the said *R. W.* that he claimed a title thereto in fee simple, by virtue of a deed of conveyance before that time executed, by the said *E.* to him. That thereupon, the said *R. W.* communicated this to the said *E.*, who positively denied all knowledge of any such deed ; but, upon search being made among the land record books of said county, it was discovered, that such a deed had in point of fact been executed by the said *E.*, on the 21st June, 1839 ; and the said *Elisha Berry* avers, that the first intimation which he ever had of the existence of this last mentioned deed, was from the said *R. W.* in manner aforesaid ; that he never contracted or agreed to sell or convey, any land to the said *W. F. B.* ; never received from him the consideration money, in the said deed expressed and mentioned, or any other valuable consideration for the said deed, but most solemnly asserts, that the said deed was procured from him by the said *W. F. B.*, by fraud, deception, and misrepresentation ; and, as well as the said *E.* can recollect, it must have been in the following manner : That

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about the time the said deed bears date, the said *W. F. B.* called on him, the said *E.*, when the latter too had not recovered from the effects of a violent attack of epilepsy which he had had then within a day or two before, and assured him that it was indispensably important, and for the interest of him, the said *E.*, that the sum of fifteen hundred, or two thousand dollars, should be raised immediately, for the use and benefit of his estates; that he, the said *W. F. B.*, could effect this very readily, if he, the said *E.*, would execute the paper which he, the said *W. F. B.* had had prepared, or would have prepared for that purpose. That if he would do so, his property would be relieved of some difficulties, and that the money which was to be raised on the paper, which he the said *E.* was required to sign, could be speedily returned to the lender, when the said paper would be returned to him, the said *W. F. B.*, who would certainly destroy or cancel it: and he, the said *E.*, should never again hear of it. That having the most unlimited confidence in the said *W. F. B.*, and in the truth of his said representation, and owing to the highly fiduciary relation in which the said *W. F. B.* at that time stood to him, the said *E.*, weak and feeble as he then was, consented to accompany him to *Upper Marlborough*, for the purpose aforesaid, which he could only accomplish, being carried thither in a carriage; and there, under the circumstances stated, executed a paper or instrument of writing, which he now believes to be the deed, a copy of which is herein before referred to, as exhibit B. The said *E.* avers, that the said deed was not read to him, or by him, prior to the execution thereof, and even if it had been it is extremely doubtful, whether in his then state both of body and mind, he should have been able to comprehend it, and that he executed it under a belief, that it was such a paper as the said *W. F. B.* represented it to be, and to raise money for his use. That although the land mentioned in and conveyed by this deed, is worth a much greater sum than the consideration money therein expressed, (four thousand dollars,) the said *W. F. B.* still is, (without the aid of the said land,) and always has

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been, utterly unable to pay or raise so large a sum of money ; that he was, indeed, at the time of the execution of this deed, in very indigent circumstances, and without even any employment or visible means of support, for himself and family, except what he might derive from the aforesaid agency, and the property of the said *E.*, which, in virtue thereof, was in his hands and under his management. That the said deed, so as aforesaid made and executed by the said *E.*, to the said *W. F. B.*, being, as they are advised and insist for the reasons stated, fraudulent and utterly void, your orators have by the said *R. W.*, as their trustee aforesaid, applied to the said *W. F. B.*, and requested him to deliver up and convey to the said *R. W.*, to be held by him for the purposes stated in the deed, hereinbefore first mentioned, and referred to as exhibit A, the land embraced in the said deed, from the said *E.* to to the said *W. F. B.* But now, so it is, may it please your honor, that the said *W. F. B.* combining, &c., and contriving how to wrong and injure your orators in the premises, he, the said *W.*, absolutely refuses to comply with the reasonable requests of your orators, pretending and asserting, that the said deed executed by the said *E.* to him, was for a fair *bona fide* and full consideration, and procured by no undue and fraudulent means on his part ; whereas, your orators charge, that the said *W. F. B.* well knows, that the same was procured by the misrepresentation and deceit, hereinbefore stated, in gross violation of the confidence reposed in him by the said *E.*, and without the payment of a single dollar for the land therein embraced ; all which actings, doings, refusals, and pretences, are contrary, &c.

Prayer, that the said *W. F. B.* may answer this bill, and that the said deed bearing date the 21st June, 1839, may be set aside and cancelled, by a decree of this court ; and that an account may be taken of the rents, issues and profits, received by the said *W. F. B.*, from the lands embraced in the said deed, since the date thereof, and that he may be decreed to pay the same to the said *R. W. B.*, as trustee aforesaid. And that your orators may have such other and further relief in the

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premises, as the nature and circumstances of this case may require, and to your honor seem meet, and for *subpœna*, &c.

With this bill the complainant filed various exhibits, as follows :

A. Indenture dated 24th February, 1840. *Elisha Berry* to *Robert W. Brooke*, for “*Good Luck*,” or “*Springfield* ;” for “*Provincial*,” “*Enclosure, or Enclosures*,” “*Fife Enlarged*,” “*Chilleno Castle*,” and “*Belfast, or Addition to Charles’ Gift*,” “*Centreville*,” together with all his slaves that I have now in my possession ; all his household and kitchen furniture, farming utensils and plantation stock ; “all his interest in the estate of the late *Nancy Berry*,” in trust, &c.

B. Indenture of 21st June, 1839. *Elisha Berry* to *William F. Berry*, in consideration of \$4000 ; for “*Chilleno Castle*,” 194 acres, 1 rood ; “*Belfast*,” or “*Addition to Charles’ Gift*,” 37 acres ; *John’s Choice Diminished*,” $11\frac{3}{4}$ acres : in fee, with a general warranty.

The defendant was summoned, and appeared, but not answering the bill, on the 19th July, 1841, an interlocutory decree was passed against him, and an *ex parte* commission was ordered and issued.

At the same term, July 1841, the defendant filed his petition praying, to set aside the interlocutory decree, and receive his answer ; which was ordered on the 2d September, 1841, and leave given to the defendant to file his answer.

The answer was then filed, and alleged, that prior to the filing of the bill of complaint, a bill was filed in the High Court of Chancery, by or in the name of *Elisha Berry*, one of the above named complainants against this defendant, which was answered by the defendant, and which he prays may be taken and considered as a part of his answer to this bill of complaint, so far as the same is applicable to the allegations therein contained. As this defendant’s answer to the former bill, filed as aforesaid, in the name of *E. B.*, against him, gives a full and detailed account of the appointment of this defendant, as the agent of the said *E. B.*, and of the manner

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in which said agency was conducted by him ; and the state of the account between him and the said *E. B.* ; of the termination of said agency, this defendant refers to his said answer, as his answer to the similar allegations in this bill of complaint. Further answering, this defendant says, that on the 9th December, 1836, he purchased of the complainant, *E. B.*, a tract of land called "*Chilleno Castle*;" also, one other parcel of land, called "*Belfast*," or, "*Addition to Charles' Gift*;" and also, part of one other tract of land, called "*John's Choice Diminished*;" and on the same day, to wit, the 9th day of December, 1836, the said *E. B.* executed to this defendant a bond of conveyance, for said lands, a copy of which is herewith filed, marked exhibit, No. 1 ; and is prayed, &c. That this defendant agreed to pay the said *E. B.*, for said lands, the sum of \$3700, that being the sum which the said *E. B.* had given for said lands, some two or three years prior to the sale to this defendant. That on the 5th December, 1836, being four days prior to the execution of the said bond of conveyance, and the time at which this defendant first contracted for said lands, this defendant paid to the said *E. B.*, the sum of \$2000, in part payment of said lands ; as will appear by a copy of the receipt for the same from the said *E. B.* to this defendant, herewith filed, marked exhibit, No. 2. This defendant further answering, says, that he has since paid the balance of the purchase money of said lands, in the manner and at the times specified, in an account herewith filed, marked No. 3 ; and that the said *E. B.*, in accordance with his bond of conveyance, on the 21st June, 1839, executed the deed, conveying said lands to the defendant, of which, the complainants' exhibit B, is admitted to be a correct copy. And this defendant here expressly alleges, that the said account, marked No. 3, exhibits a full, just, and fair state of the account, between him and the said *E. B.*, that said account contains all the credits, to which the said *E.* is in any manner whatever entitled ; and that the advances made by this defendant, as exhibited by said account, were made by this defendant, under, and by virtue of an understanding

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had with the said *E. B.*, that this defendant should make said advances in payment of the balance of the purchase money of said lands. Further answering, this defendant says, that the said *E. B.* being unable to procure the relinquishment of dower by his wife, as he had by his aforesaid bond of conveyance contracted to do, did on the 21st June, 1839, the same day on which he executed said deed, execute to this defendant a bond, conditioned to indemnify this defendant from all claim of dower on the part of his said wife ; as will also appear by a copy of said bond, herewith filed, marked No. 4. This defendant further answering, says, that the allegation in said bill of complaint, that the said *E. B.* was induced by this defendant to execute said papers improperly or fraudulently, and when the said *E.* was in a weak and feeble state of health, and incapable of judging of their true import and meaning, is wholly untrue. This defendant, in answer to said allegations, says, that the said *E.* had not been sick for a long time prior to the execution of said papers, and that the said *E. B.* never had an epileptic fit, nor any other fit, until the marriage of his daughter with the complainant, *R. W. B.*, and until long after the execution of said papers. That the said *E. B.* was, on the day he executed said papers, in good health, and was through the whole day, entirely sober, and free from the influence of liquor. This defendant further says, that the said *E. B.* was, when sober, fully capable of guarding his own interest, and was as difficult to deal with, or get a bargain out of, as any man in the community. This defendant further says, that the sum which he contracted to pay, and has paid, for said land, was fully the value of the said land, at the time this defendant contracted to buy it ; that it was the same price which had been given for said lands some short time before by the said *E. B.* This defendant further says, that the complainant *E. B.*, has, since the filing of the said bill of complaint, departed this life, having previously, in due form of law, executed his last will and testament, appointing this defendant his sole executor, as will appear by a certified copy thereof, herewith filed, marked No. 5. That said will has

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been admitted to probat, by the *Orphans' Court of Prince George's county*. It will thus appear to your honor, that the complainants claiming under a deed from the said *E. B.*, executed without any valuable consideration, are seeking in a court of equity to set aside a deed executed by the said *E. B.* for a full money consideration.

This defendant further answering, denies all, and all manner of fraud, deceit, imposition, or undue influence, with which he stands charged, in and by the said bill of complaint. This respondent further says, that from the time he contracted for said lands, as herein before stated, he has been in the quiet, peaceable possession of the same, &c.

The defendant with his answer filed various exhibits, as follows, viz :

No. 1. Bond of *E. B.* to *W. F. B.*, dated 9th December, 1836, to convey the land on which *W. F. B.* then resided, consisting of several named tracts.

No. 2. Receipt.

"Received 5th December, 1836, of *William F. Berry*, \$2000, for the property he, the said *W. F. B.*, now resides on, with appurtenances thereunto, which money is deposited in bank, to be checked for by the said *W. F. B.*, and applied to the payment of my debts. E. BERRY."

"Witness, *E. D. Ferguson*."

No. 3. Account. Dr. *E. B.* to *W. F. B.* Cr.

The account commenced 8th January, 1839, and concluded 20th May, 1840 ; including in its debits \$175, for *W. F. B.*'s services as agent. The debits amounted to \$2289.68. The credits, \$378.95, for August, 1839 ; leaving *E. B.* in debt, \$1910.13.

No. 4. *E. B.*'s bond of indemnity, 21st June, 1839, to *W. F. B.*, against the dower right of *Deborah Berry*, in lands conveyed by deed of this date: penalty, \$5000.

No. 5. Will of *E. B.*, devising to *W. F. B.*, farm called "*Springfield*;" 500 acres ; various negroes and farming utensils ; with devises to other children ; dated July, 1843, with probat.

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Then followed the answer in chancery, sworn to on the 14th July, 1840, referred to in the answer in this cause, with the various exhibits originally filed therewith, viz :

No. 1. Sales of 4 hhds. of tobacco, 24th August, 1842, to *A. C. Casinove & Co.*, by *E. Berry*. Amount, \$158.37.

No. 2. Account. *Elisha Perry* bought of *Elisha Berry*, 6th April, 1836, \$158.98 ; settled by various credits to *E. P.*

No. 3. Sales of tobacco to *A. C. C. & Co.*, by *R. Wright* ; \$449.41. 6th November, 1838.

No. 4. Same as previous exhibit, No. 1. Bond of Indemnity.

No. 5. Indenture of 21st June, 1839. *E. B. to W. F. B.* : consideration, \$4000. Conveying various tracts of land in *Prince George's* county, and all the estate of *E. B.* therein, in fee, with general warranty. Recorded 18th July, 1839.

No. 6. Bond of indemnity against dower, as before mentioned.

No. 7. Articles of agreement, under seal of 1st January, 1837. Between *E. B.* and *W. F. B.*, by which the former agreed to furnish the latter, with certain property, viz: eight slaves, two plough horses, two oxen, ploughs, carts, and other plantation utensils ; all which is to remain with the said *W. F. B.* on the land where he now resides, for, and during the term of ten years, and pay him \$150, annually ; and the said *W. F. B.* on his part, agreed to pay *E. B.*, the one-half of the crops made by him, the said *W. F. B.*, for and during the said term, after deducting the expenses of making the said crops ; and *W. F. B.* also agreed to superintend and look after all the said *E. B.*'s business.

No. 8. Acknowledgment of *E. B.*, that on settlement with *W. F. B.*, 8th January, 1839, he owed him \$440.32.

No. 9. Account. Dr. *E. B.* to *W. F. B.* Cr. Debits between 8th January, 1839, (including above balance,) and 20th May 1840, of cash paid to various persons : for carriage horse, harness, bridge tolls, pork, beef, flour, store accounts, attorney's fees, and for services as agent, from 1st January, 1839, to 2nd March, 1840, in all \$2889.08, and credits for

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wheat made at *Springfield*, and cash received for rent and judgments, \$378.95. Balance in favor of *W. F. B.*, \$1910.13.

The complainants filed a general replication at September term, 1841, and on the 22nd October, 1841, a commission to take proof, was issued by consent.

The *ex-parte* commission issued on the 19th July, 1841, was then returned, under which, various witnesses had been examined. That commission was closed on the 30th September, 1841.

Another commission was issued on the 25th October, 1841, which was closed 21st February, 1843. Under these commissions a great variety of evidence, documentary and otherwise, was taken, and returned into the court of chancery. This is sufficiently adverted to, in the opinion of this court!

On the 15th November, 1843, the death of the complainant, *Elisha Berry*, was suggested on the record.

The complainants excepted to the admissibility of portions of the proof, taken under the commission, which issued on the 25th October, 1841; and which was returned on the 28th February, 1843.

1st. To the answer of *Benjamin Duvall* to the defendant's third interrogatory: upon the ground, that evidence of the defendant's character, is irrelevant and inadmissible.

2nd. To the answers of *Enos D. Ferguson* and others, to the same interrogatory: upon the same ground.

3rd. To that portion of the answer of *Thomas G. Pratt*, to the defendant's fourteenth interrogatory: which speaks of the belief and impression of the witnesses.

4th. To the answer of *Jesse Talbot* to the defendant's eleventh interrogatory: upon the ground, that the declarations of the defendant to the witness, are not testimony in his favor.

5th. To the admissibility of the evidence of *Thomas F. Bowie*. 1st. Because he speaks of conversation with the defendant. And 2nd. Because he refers to the contents of paper writings, which are not shown to be out of the reach of the defendant, or lost or destroyed.

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6th. To the answers of all the witnesses examined on the part of the defendant: because the interrogatories, to which those answers are responses, are all and each of them, leading interrogatories.

7th. To the answer of *Elisha Perry* to the defendant's nineteenth interrogatory: upon the ground, that the declarations of *Elisha Berry*, and more particularly his declarations after the execution of the deed to *Robert W. Brooke*, are not evidence against the complainants. And they also except to the depositions of all the witnesses of the same character.

8th. To the answer of *Enos D. Ferguson* to the defendant's tenth interrogatory: because the paper therein referred to, was not produced, or its absence accounted for.

The defendant excepts to the averments and allegations in the complainants bill, and to their sufficiency.

1. That there is no averment or allegation that the defendant committed a fraud upon his principal *E. B.*, in the purchase of the land in controversy, as agent or trustee.

2. That there is no averment or allegation, that the said purchase of the land in controversy, was made in breach and violation of the said defendant's duty and relation to the said *Elisha*, as agent or trustee.

3. That there is no averment or allegation, that the said purchase was made within the scope of the defendant's agency or trusteeship, or in the exercise of the power delegated to him by complainant, *E. B.*

4. That there is no averment or allegation in the bill, that the said defendant was authorised to sell the said land by the complainant, *E. B.*

The defendant also excepts to all proof taken by the complainants under both commissions; because, the interrogatories, each and all of them, are leading in answer to which the said proof is taken.

The defendant, also, excepts to the admissibility of all the complainants' proof, taken under the special and *ex parte* commission, that issued in this cause.

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1st. Because all the interrogatories propounded to the witnesses, were leading interrogatories, particularly the 2nd, 3rd, 4th, 5th and 9th interrogatories, and the proof is therefore inadmissible.

2nd. Because the said proof was obtained in reply to interrogatories, which were leading, and is therefore inadmissible.

3rd. Because the Chancellor by his order, passed on the 2nd September, 1841, cancelled and set aside the interlocutory order, under which the said proof was taken.

4th. Because all of said proof and testimony was taken, without any notice having been given to the defendant, or to his solicitors.

On the 27th November, 1843, the Chancellor (BLAND,) dismissed the bill with costs, being of opinion, that there was no sufficient evidence of the incompetency of the said *Elisha Berry* to contract, at the time of making the contract, which this suit seeks to have set aside, nor is there any sufficient proof of the said contract having been obtained by any fraud or mistake.

From which decree the complainants appealed to this court.

The cause was argued before ARCHER, DORSEY, CHAMBERS, SPENCE, STONE and SEMMES, J.

By J. JOHNSON, for the appellants, and

By C. C. MAGRUDER and PRATT, for the appellees.

DORSEY, J., delivered the opinion of this court.

We do not think that the exceptions taken by the defendant to the averments in the bill of complaint can be of any avail to him; regarding the bill as sufficiently charging, if established by proof, that the defendant's title to the land in controversy was obtained by fraud; that if not obtained by fraud, it was acquired from *Elisha Berry*, a man of such feeble intellect as to be incompetent to the management of his own business, by *William F. Berry*, the defendant, his agent for the transaction of all his business, in whom he reposed entire confidence, under such circumstances of abused confi-

fidence or practised imposition, or under terms so unjust and unequal, as would affix to it the seal of condemnation, when brought to the view of a court of equity.

Neither can the defendant be benefitted by his exceptions to the proof taken under the commissions, issued for that purpose, because the only tendency of the proof, elicited under those portions of the complainants' interrogatories which are justly obnoxious to the exceptions taken to them, is to establish facts admitted in the defendant's answer, or satisfactorily proved by other testimony in the cause, which stands exempt from all objection. Nor is there any force in the defendant's exception to all the testimony returned under the *ex parte* commission on the ground that it was vacated and set aside by the Chancellor's order rescinding the interlocutory decree for the purpose of letting in the defendant's answer. The third section of the act of 1820, ch. 161, expressly providing that "the filing of such answer or answers shall in no case affect the validity of any commission previously issued to take testimony, or of the proceedings, or any of them, under such commission, or of any testimony previously taken and returned under any such commission." All the proof under the *ex parte* commission was taken prior to the rescission of the interlocutory decree on which it issued, and its efficacy is the same, whether previously, or subsequently returned.

There is no ground for the defendant's exception to the testimony under the *ex parte* commission, that it was taken without any notice having been given to the defendant or to his solicitor. No such notice was requisite. The defendant having no power of offering testimony before the commissioner, or of cross examining the witnesses produced on the part of the complainant.

The exceptions of the complainants to the testimony, on the part of the defendant, offered to prove the good character and upright conduct of *William F. Berry*, we think were well taken. Such evidence being inadmissible in this cause. As authority for which, see note 339 of 2 *Cowen's Phil. on Ev.* 456.

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These preliminary questions being disposed of, we are brought to the consideration of the real merits of this controversy, as they appear upon the record before us. The allegation of actual fraud, as charged in the bill, has not been proved, and was not insisted on in the argument for the appellants. But it is contended that the feebleness of the intellect of *Elisha Berry*; the condition in which he stood in relation to the appellee, his agent for the transaction of all his business; the inadequacy of the price alleged to have been paid for the land conveyed, and all the circumstances surrounding the transaction, are of such a character, that they can receive no countenance from a court of equity; and that the deed complained of ought to be vacated. And in this view of the case we entirely concur. The agency of *William F. Berry* in the transaction of all the business of *Elisha Berry* is admitted by the answer and proved by not less than eight witnesses. As to the feebleness of *Elisha Berry's* intellect and his incapacity to transact his own business, there is a great contrariety of evidence, twelve witnesses having deposed to the existence of such feebleness and incapacity and nine against it. But the opinion of the twelve are corroborated by the declarations of *William F. Berry* himself, who, at different times, to three different individuals, whose testimony is before us, and to one of them on more occasions than one, stated that his brother *Elisha* was incapable of transacting his own business. Looking then to this testimony only, and the number of witnesses testifying for each party upon the simple question of mental capacity, there would be perhaps a sufficiency of evidence, not only to control the positive denials in the answer, but also to entitle the appellants to the relief which they have sought. And when we connect this testimony with the relation in which the appellee stood to *Elisha Berry*, as his agent for the transaction of all his business, and with the fact that the land has been purchased greatly below its value, we cannot see how, consistently with the well established principles of equity, we can withhold relief from the appellants. By averaging the valuations fixed, on the land in question, by the eighteen wit-

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nesses who have deposed as to its value, instead of being sold, according to the alleged contract, for three thousand seven hundred dollars, six thousand five hundred and twenty dollars ought to have been paid for it. And this estimate of its value is strongly sustained by the nine witnesses who were examined as to what was a fair yearly rent for the land. By an average of their testimony the yearly rent would be \$347.21; the capital to raise which, by an investment in land producing an interest of five per cent. (which is deemed a remunerating income from investments in land in the country,) would be \$6,944. And fixing the rate of interest to be derived from such an investment at six per cent. per annum, would be \$5,787.

The guards and limitations which a system of enlightened jurisprudence has cast around the dealings of principal and agent, have been so accurately defined by *Justice Story, in his 1st vol. of Commentaries on Equity*, 310, section 315, that we deem it, in this case, unnecessary to cite any other authority on the subject. After treating in the preceding section of the connexion between guardian and ward, trustee and *cestui que trust*, &c., and of what transactions between them shall stand: In the 315 section, in speaking of the relation of principal and agent, he says: "this is affected by the same considerations as the preceding, founded upon the same enlightened public policy. In all cases of this sort, the principal contracts for the aid and benefit of the skill and judgment of the agent, and the habitual confidence reposed in the latter, makes all his acts and statements possess a commanding influence over the former. Indeed; in such cases, the agent too often so entirely misleads the judgment of his principal, that, while he is seeking his own peculiar advantage, he seems, too often, but consulting the advantage and interests of his principal." "It is, therefore, for the common security of all mankind, that gifts procured by agents, and purchases made by them from their principals, should be scrutinized with a close and vigilant suspicion. And indeed considering the abuses which may attend any dealings of this sort between principals and agents, a doubt has been expressed, whether it would not have been

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wiser for the law in all cases to have prohibited them, since there must always be a conflict between duty and interest on such occasions. Be this as it may, it is very certain that agents are not permitted” “to deal validly with their principals in any cases, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.” If these principles of *Justice Story* be correct when applied to dealings between principal and agent, where the mind of the principal is exempt from all imputation of imbecility, what must be their influence when applied to a case like that, now before this court.

But in arriving at the conclusion we have formed in reference to the case before us, we are not compelled to rely solely on the oral testimony in the cause to convince us of the incapacity of *Elisha Berry* to transact his own business; of the excess of confidence reposed by him in the appellee, and the undue influence exerted over him by the latter. The acts of *Elisha Berry* and *William F. Berry*, as shown by the documentary evidence and oral testimony in relation thereto, irresistibly impel us to the opinion we have before expressed. *Elisha Berry*, it appears, has been in a state of wardship from the time of marriage till his death. If possessed of sufficient intellect to transact his own concerns, why should this have been? In 1829, *William F. Berry* for the first time became his agent for the transaction of all his business, and so continued until 1833, when he was superseded by *Richard H. Marshall* being appointed his successor. The first act of the administration of *William F. Berry*, which has been brought to our notice, is the obtaining from *Elisha Berry* the deed of the 21st of June 1831, for *Springfield* or *Good Luck*, containing upwards of five hundred acres of land (being his dwelling plantation) and ten negroes, all his household and kitchen furniture, plantation utensils and all the stock belonging to *Elisha Berry*, with a general warranty. Such a deed, for a merely nominal consideration, from a farmer, having a wife and children dependent on him for support, without any explanatory circum-

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stances to sustain it, would bear, upon its face, internal evidence of mental imbecility in the grantor almost amounting to idiocy or lunacy; or that he had been the victim of undue influence; or been so overreached or imposed upon that the interposition of a court of equity, for his relief, would follow as a matter of course. And the presumptions against this deed are strongly fortified by the inconsistent conduct of the appellee, who, when superseded in his agency by the appointment of *Richard H. Marshall* in 1833 to a bill filed against him, in *Prince George's* county court, by *Elisha Berry* and *Richard H. Marshall* to set aside the said conveyance, though denying almost every allegation in the bill, insisted on the said conveyance as a fair and *bona fide* deed of gift from his brother *Elisha Berry*, voluntarily and freely made, and at his own instance and suggestion. Whilst to his solicitor he stated, notwithstanding the imputations cast upon him by the bill, that he had no design to keep the property against *Elisha Berry's* children, but only wished to prevent *Richard H. Marshall* from having any control over it. And yet, instead of going to his brother and having a full explanation upon the subject, and re-conveying the property to him, or some other person, other than the said *Richard H. Marshall*, we find the said *William F. Berry*, a few months after the filing of his answer, voluntarily reconveying the whole of the property, both real and personal, mentioned in the said alleged deed of gift, to *Richard H. Marshall*, in trust for *Elisha Berry* and his heirs. If this deed to *William F. Berry* was, as stated in his answer, a fair and *bona fide* deed of gift, made at the instance and suggestion of *Elisha Berry*, why was the property given by it suffered to remain in the hands of the donor from the date of the deed in 1831, till the filing of the bill for its recovery in 1833, without the slightest evidence, as far as the record discloses, of any demand of possession or assertion of title on the part of *William F. Berry* (then very poor according to all the proof,) to any portion of the property conveyed to him. As fraud is expressly denied by his answer, we can only account for his conduct by supposing him conscious of the mental imbecility of his brother, and of the invalidity of the conveyance executed in his favor.

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In 1836, *Richard H. Marshall* having been dismissed from the service of *Elisha Berry*, he restored to his favor and confidence *William F. Berry*, and clothed him with his former plenary powers, as agent: who, as stated in his answer in the case now under consideration, purchased of his brother, in the beginning of the month of *December* of that year, two hundred and forty-two and a half acres of land, as is alleged, at its full value; that is, \$3,700. For which, however, *Elisha Berry* had three years before paid \$3,750, and had been offered for it by *Benjamin Duvall*, the person of whom, by his agent *Richard H. Marshall*, he had previously purchased it, the sum of \$6,112.50, which offer had been rejected by *Elisha Berry*. Connecting this testimony of *Benjamin Duvall*, the appellee's witness, with the average value of the lands, as derived from all the witnesses sworn on that subject, it can hardly be insisted, that the appellee has not, in a contract with his principal, obtained a conveyance of his lands at a price greatly below their value. Which of itself would induce a court of equity (apart from the mental incapacity of the principal,) to set aside the contract, unless it were shown by competent testimony, that the contract was entered into in a way and under circumstances, which made it apparent, that there had been no abuse of confidence; no undue influence; no imposition or material concealments practised by the agent upon the principal, which could cast a shade of doubt as to the fairness and honesty of the transaction. In this case, the contract is supported by no such conservative testimony. And, cast in the scale of objections to it, the reasonable doubt, if not the established fact, of the great mental imbecility of *Elisha Berry*, and this contract of 1836, cannot stand the scrutiny of a court of equity.

If, as is alleged in the answer of the appellee, the land was designed to be sold to him for its full value, how can we, consistently with *Elisha Perry's* mental capacity for the transaction of business, his exemption from undue influence or imposition, account for his selling his land for \$3,700, to his agent, when he had been offered for it \$6,112.50, by another

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person; and there is nothing in the record to induce a belief, that he could not still have obtained it? But if all other testimony were wanting on the subject, it is difficult to conceive how the written instruments exhibited by the appellee himself, to establish the contract of 1836, can be read without exciting the strongest suspicions, if not a confident belief, in the mental incapacity of *Elisha Berry* for the transaction of his own business; or that this contract of 1836, was obtained from him by an abuse of confidence, undue influence, or some objectionable means. 'The first of these instruments is *Elisha Berry's* receipt to *William F. Berry*, for \$2,000 in advance, for the lands now in dispute, which money, the receipt states, is deposited in bank, to be checked out by *William F. Berry*, in payment of the debts of *Elisha Berry*. This sum of \$2,000, one of the witnesses proves, was, about the 1st of December, 1836, deposited in his own name by *William F. Berry* in the *Bank of the Metropolis*. If *Elisha Berry* had been capable of transacting his own business, would he have been content that the receipt which he had signed, should be the only receipt signed in relation to this \$2,000? Would he not have taken some receipt or written evidence from *William F. Berry*, that \$2,000 had been placed in his hands, to be applied to the payment of *Elisha Berry's* debts. Suppose *William F. Berry* had been unfaithful to his trust, and applied the \$2,000 to the payment of his own debts; or had denied its receipt, and refused to account for it in any way, what written evidence had *Elisha Berry* to show the accountability of his agent? None. Would a man of capacity to transact his own business thus deal with an agent, when placing thousands in his hands? If he would, it shows that he reposed a blind confidence in his agent, which should taint with suspicion all contracts, between them, for the purchase of the principal's property. The contracting parties do not meet on equal terms. Nor would an agent, discharging his duties with fidelity to his principal, and protecting, as he ought to do, the interests of his principal with the same care and circumspection that he would his own, thus deal with him.

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The next written instrument relied on by the appellee, as showing the fairness of his title under the purchase from *Elisha Berry*, is the bond of conveyance of *Elisha Berry*, bearing date four days after his receipt for the \$2,000, viz : on the 9th day of December, 1836. It is not pretended, on the contrary, the answer of the appellee disproves it, that when the bond of conveyance was executed, there had been any other payment made on account of the land, except the two thousand dollars. And yet, by the explicit terms of this bond of conveyance, without any condition as to the payment of the balance of the purchase money, or any thing else; and without the said *Elisha Berry's* receiving any bond, note, or written acknowledgment for such balance, he is bound in a penalty of ten thousand dollars, on or before the first day of November next, thereafter, to make a conveyance in fee simple, clear of all incumbrances, to *William F. Berry*. This bond of conveyance is virtually an acknowledgement that the whole purchase money had been paid; and in case of the death or infidelity of the appellee, *Elisha Berry*, as far as the record informs us, had not the semblance of evidence, on which he could rely, for the recovery of that portion of the purchase money remaining unpaid. Can it be believed, that a man capable of transacting his own business, would have placed himself in such a situation? It is no excuse for it to say, that this money was thus left in the hands of the agent, to be appropriated to the use of the principal, as occasion might require. No principal who knew what was due to himself, nor agent, who looked to the interest of his principal, would have assented to such an arrangement. It evinces a degree of mental incapacity, or unbounded confidence on the part of the principal, or undue influence by the agent, that *prima facie*, should infect and invalidate all contracts and transactions between them. There are other facts in reference to the written instruments, exhibited by the appellee, which, if weighed separately, would be esteemed of little import, but when viewed collectively and in connexion with the testimony and other facts of the case, tend to strengthen the views

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hereinbefore expressed. The deed of 1831, though asserted to be a voluntary deed of gift, contains a general warranty; which is rather an unusual ingredient in such a conveyance. The bond of conveyance makes the penalty for its breach ten thousand dollars; and this bond is retained by the obligee, instead of being delivered up to the obligor, at the time of his executing the deed of conveyance. This deed states the purchase money paid for the land to be \$4,000, instead of \$3,700, as shown by the answer, and contains a covenant of general warranty, whilst at the time of its execution, *Elisha Berry* is made to execute a bond of indemnity, against the claim of dower, in the penalty of five thousand dollars. In these transactions between *William F. Berry* and *Elisha Berry*, it is impossible not to see, that whilst the rights and interests of the former were provided for, and protected by every guard which could be thrown around them, the rights and interests of the latter, were disregarded and abandoned, as it were, to take care of themselves.

In pursuance of the foregoing views, this court will sign a decree reversing with costs the decree of the Chancery Court; and remanding this cause thereto, that a decree may be there passed for the annulling and cancelling the said bond of conveyance, and bond of indemnity, and the two deeds of conveyance, from the said *Elisha Berry* to the said *William F. Berry*, which said deeds bear date on the 21st day of June, in the year 1839; and for the sale of the lands and premises therein mentioned; and for an account between the appellants and the appellee, in which the appellee shall be charged with the rents and profits of the said lands, and be credited for his improvements thereon, during the time he shall have held and enjoyed the said lands under his alleged purchase thereof; and shall be credited with all the sums of money by him *bona fide* paid, on account of the said *Elisha Berry*, or which shall be justly due and owing from him to the said *William F. Berry*. The sum of \$2,000 deposited in the *Bank of the Metropolis*, and for which *Elisha Berry* gave a receipt, is not to be credited to him, the said

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William F. Berry, until additional proof is offered, to shew that the same has been properly applied in discharge of the liabilities of the said *Elisha Berry*.

And this cause is furthermore remanded, that the chancellor may pass such further orders and decrees therein, as the nature of the case may require. The items in exhibit, No 3, of defendant, to be deemed by the auditor as established, except the first of said items, of \$440.32, the balance on settlement.

DECREE REVERSED, AND CAUSE REMANDED.

JOSEPH I. JONES vs. TRUEMAN BELT.—*December 1844.*

Where a complainant alleged the existence of a contract with the defendant, accompanied with collateral circumstances, and called upon him not to state what the contract was, but to admit or deny the existence of the agreement and circumstances set forth; and the defendant, in his answer, averred another agreement between him and the complainant, and denied the collateral circumstances: the statement of the agreement by the defendant in such case is not *simply* responsive to the contract he was called on to admit or deny. It is not such a denial as requires two witnesses, or one with concurring circumstances to disprove it; nor in this case was it necessary to disprove the denial of the collateral circumstances by the same amount of proof.

It is a general rule, that a positive denial, in an answer of the contract stated in the bill, should be contradicted or outweighed by the proof of two witnesses, or one witness and pregnant circumstances; but the principle on which it is predicated is not one of universal application.

As where two papers were exhibited in the cause; admitted in the defendant's answer, and declared by the court to be the agreement of the parties, they are sufficient to control the answer denying the agreement, without the aid of any oral testimony in their support.

The cases to which the rule was introduced to apply, must be those in which the facts denied depended on oral testimony; or oral and circumstantial evidence; not where they were conclusively proved by the production of the written contract of the parties.

Neither are the exceptions to the rule confined to cases, where the contract denied, has been formally signed and executed; as where a verbal contract is made, to which no witness could testify, and a complainant, charging and seeking its performance, were to exhibit with his bill various letters written by the defendant to third parties, stating the contract, all which

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letters, the answer denying the contract, admitted to be genuine; this would dispense with the general rule in question.

A defendant cannot exempt himself from the obligation to make a conveyance which he stipulated to make, on the ground that he has not the legal title.

A vendee, against whom a decree for specific performance of a contract of purchase is sought, may object the want of title in his vendor, as insuperable in ordinary cases.

Ordinarily Chancery will not compel a purchaser to pay the purchase money and accept a defective title. But a vendor has no interest in setting up his own want of title.

A decree which refers to the bill for a description of the lands on which it is intended to operate, is not vague and uncertain in that respect.

This court, in affirming the decree of the Court of Chancery, will make such appropriate additions to its terms, as may be necessary to secure to both parties the benefits, advantages and prospective rights for which they mutually stipulate, in relation to which the decree appealed from was silent, or not sufficiently precise.

APPEAL from the Court of Chancery.

The bill in this cause, which was filed on the 28th November 1838, by the appellee, alleged, that he is the owner in fee simple of a tract of land situated at the intersection of the *Washington Branch* of the *Baltimore and Ohio Rail Road*, and the turnpike road between *Baltimore* and *Washington*, at a place called *Beltsville*; that upon the said tract of land he has a house and improvements, occupied and used as a tavern stand, the value of which mainly consists in its being a stopping and watering place of the trains of cars passing on the rail road between *B.* and *W.*; that before your orator erected his present improvements on the said tract of land, he enquired of and ascertained from the *B. and O. R. R. Company*, that they would make the said intersection a stopping and watering place, provided a supply of water could be obtained in the vicinity, sufficient to fill the tank or reservoir that it would be necessary for the said company to erect, for the use of the engines, drawing trains on the said branch road. He being interested in the matter, made enquiry at once, and aided in his examination by the officers of said company, ascertained that a supply of water could be obtained in requisite abun-

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dance from certain springs on the land belonging to a certain *Joseph J. Jones*. That the place on said land where said springs were found, presented at the time no appearance of an open and running spring, available in its then condition, for useful purposes; but was a damp, wet and sobby piece of ground, indicating the existence of springs of water, which might be made available by digging down, walling a reservoir, and collecting the small streams of water into one head; the evidence of the supply of water being satisfactorily ascertained, application was made to the said *Jones*, for permission to collect the springs and conduct them by suitable pipes to the intersection of the two roads aforesaid, there to furnish a supply of water to the tank or water station proposed to be built. That the said *Jones* at once assented to the use of the said springs of water, with the understanding, that when the said springs were collected into a common reservoir, and the same walled up, one half of said reservoir should be left open for the use of said *Jones*, and upon condition that your orator would agree to indemnify the said *Jones* for all damages that he might sustain in the opening of the ground, for the purpose of laying down pipes to conduct the water from the spring to the water station aforesaid, the said *Jones* requiring no other compensation for the use of the springs in their then condition, than the use of one half of the spring when it should, by digging and walling, as aforesaid, be made available for useful purposes; and the agreement, aforesaid, of your orator, to indemnify the said *Jones* for damages that he might sustain in laying down the pipes aforesaid. That the said *R. R. Co.* being unwilling to incur the expense of erecting the water station necessary to receive the water from the spring, without an assurance that they should have the use of the water, and being unwilling to meddle with the springs without the consent of the proprietor of the land, required that your orator should obtain from the said *Jones* a binding evidence of his assent. That your orator accordingly applied to the said *J.*, for a deed of conveyance of the said springs, with the rights necessary to the use of them for the

purpose aforesaid ; that the said *J.* made no objection to the execution of such an instrument, but alleged that he had recently purchased the land, and had himself, as yet, no deed for it, but that as soon as he obtained a deed, he would execute such an instrument as was requested by your orator, and required by the said *R. R. Co.* ; and the said *J.* accordingly addressed a letter to the said *R. R. Co.*, in which he bound himself to execute to your orator a proper conveyance of the said springs, and the rights appendant to their use, and your orator bound himself to the said company to furnish to them the supply of water so to be obtained as aforesaid. And your orator here brings into court and files as a part of his bill of complaint, copies of the original papers, shewing the demand of the said company upon your orator, the obligation of your orator to the said company, witnessed by the said *J.*, and the obligation of the said *J.* to convey when he, himself, should procure a title, which papers are retained by and filed in the office of the *B. and O. R. R. Co.*, and cannot be at this stage of this proceeding obtained by your orator, wherefore he annexes the copies aforesaid, certified under the seal of said company, and which he prays may be taken as part of this, his bill of complaint. And your orator further states, that the said company did, on the execution of the said papers proceed to dig and wall the said springs and bring them into one head, over one half of which they built a covering, capable of being locked up, for their own use, leaving the other half open for the use of the said *Jones*, who thereby obtained a handsome spring, and ample supply of water, where he had, originally, nothing but a marshy and useless spot of land ; and that the said company, also, erected a tank or water station at the intersection of the roads aforesaid, and laid down pipes to lead the water into it from the said springs, and that the said company have, in accordance with their understanding with your orator, ever since made use of the said water station for the purpose of supplying the engines of their trains with water ; and your orator further states, that he gave an instrument of writing as agreed upon, as aforesaid,

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to the said *Jones*, in which your orator agreed to indemnify him for all damages which he might sustain, by the digging of his fields or grounds for the purpose of laying down the pipes aforesaid. And your orator further states, that he put up considerable and expensive buildings at the intersection of the roads aforesaid, and appropriated the same to the purpose of a tavern stand; and that the same are now under rent to a tenant, upon the condition, that one half of the rent now reserved is to be abated, should the said company cease to use the said water station as heretofore; and your orator further states, that he has been informed and believes, and so your orator expressly charges, that the said *Jones* hath now got a title to the said land, and is in a situation to convey the said spring and rights appendant thereto, to your orator. That he has been at all times willing and ready, and that he is now willing and ready, to indemnify the said *Jones* for all and any damage that he may have sustained by reason of the digging for and laying down the pipes aforesaid; but that the said *Jones* hath never made any demand upon your orator for damages, nor does your orator believe that he has sustained any, inasmuch as the said *Jones* has now an available supply of water which he had not before, and the fields around the said spring are in grass. Nevertheless, your orator is ready, and tenders to pay whatever damage the said *Jones* may have sustained, as agreed upon between them; and your orator further states, that the said *Jones* now wholly and peremptorily refuses to convey to your orator, as originally agreed upon, alleging, that your orator has not paid him a consideration for the said spring, and with a view to compel your orator to pay to him such sum as the said *Jones* may please to demand, as consideration for the use of said spring, and not as damages for laying down said pipes through his fields, threatens to take up the said pipes, or otherwise to stop the flow of water from said spring to the said water station, and has actually given notice to the said company, not to water their engines at the said station, and your orator expressly charges, that the claim thus set up by the said *Jones* is without a shadow of right, and is

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done maliciously and fraudulently for the purpose of injuring your orator, and with a view to compel him to pay for the said spring, contrary to the intention and agreement of the said *Jones*, when the said spring was made available, as aforesaid; and your orator expressly charges, that the consideration to the said *Jones* for the privilege of using the said springs, was the advantage that the said *Jones* expected to derive and has since derived, from the making of the same available to him for useful purposes, and the agreement of your orator to indemnify for all damages done by opening the ground to lay pipes, as aforesaid; and your orator further charges expressly, that it was in consequence of the undertaking of the said *Jones* to convey, as aforesaid, that your orator went to the expense of building and improving his property, as aforesaid. And your orator charges, that the interruption of the supply of the water of said spring, will at once deprive his property of the advantage of being a water station, which it now has, and besides reducing the rent paid by the present tenant one half, will otherwise seriously and irreparably injure his said property. And your orator expressly charges, as his belief and apprehension, that the said *Jones* will, if not restrained by authority of this honorable court, take up the said pipes, or otherwise interrupt the flow of water from the said spring to said water station, doing to your orator thereby, a wrong, which no action at law can compensate; and your orator charges expressly, that the said *Jones* hath given notice to the said company to cease to use the said water station, supplied from the said spring, all which actings and doings are contrary, &c.

PRAYER, that the said *Jones* convey to your orator the spring or springs aforesaid, with the rights appendant thereto, and that he may be restrained from interfering with the supply of water to the said water station, from the said spring or springs; for further and other relief; for an injunction to restrain *Jones*, &c., from digging up the pipes leading from the spring on the said *Jones*' land, now used to supply the water station of the *B. and O. R. R. Co.*, at the intersection, &c. at *Beltsville*. &c.

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Exhibit. “The President of the *B. and O. R. R. Co.*, requires of *Trueman Belt* an instrument of writing, with, at least, one surety, under a penalty equivalent to expense incurred by the said company in erecting the water station, commencing at *Jones’* spring and ending at the said *Belt’s* store, (the contract price is three thousand, seven hundred dollars, more or less,) to convey the piece of ground offered to the board, for a house for engines, cars, &c.; also, the exclusive right to the spring belonging to the said *Jones*, with free egress and ingress, necessary to improve and keep the same in perpetual repair.

JONATHAN JESSOP.”

“PRINCE GEORGE’S COUNTY, Md., *September 25, 1835.*

I, *Trueman Belt*, do this day hereby bind myself, my heirs, administrators, and assigns, to execute or cause to be executed, as soon as practicable, to the *B. and O. R. R. Co.*, the necessary instrument or instruments of writing, conveying to the said *R. R. Co.* a full and complete title to the premises herein mentioned, or intended to be mentioned, according to the true intent and meaning of the within instrument of writing, in the penalty of the sum herein mentioned, that is to say, three thousand, seven hundred dollars. In witness, &c.

(Signed,) TRUEMAN BELT, (Seal.)

Witness, (Signed,) *Joseph J. Jones.*

TO PHILIP E. THOMAS, Esq.”

“Mr. *Trueman Belt* having applied to me for my spring, for the use of the *B. and W. R. R. Co.*, and I having agreed with the said *T. B.*, to convey to him the right of said springs, and being informed by him that the said company require a legal conveyance of the premises, previous to commencing the work necessary to convey the water from said spring or springs to said *Belt’s* new store, all I can say or do, at present, is, that I have lately purchased the land on which said spring or springs are situated, and have not as yet obtained a legal title thereto, but expect to get it soon, and will immediately thereafter execute, or cause to be executed to the said *T. B.*, his heirs, or assigns, a good and sufficient title to

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the within mentioned premises, for which I hereby bind myself, my heirs, administrators and assigns, in the full and just sum of three thousand, seven hundred dollars. In witness whereof, I hereby affix my hand and seal, this 25th day of September, 1835. (Signed,) JOSEPH J. JONES, (Seal.)

Witness, *Amos A. Williams.*”

The Chancellor, (BLAND,) on the 28th November, 1838, ordered subpœna and injunction, as prayed.

The defendant's answer admitted, that the said complainant is the owner in fee, of a tract or parcel of land, situate at the intersection of, &c. at &c., and upon said land the said complainant has a house and improvements, which are now used and occupied as a tavern stand, and the value thereof, in a great measure, consists in its being a stopping and watering place for the trains of cars, passing on the *Rail Road* between *B.* and *W.* This defendant knows nothing of any enquiries made by the said complainant of the said *B.* and *O. R. R. Co.*, or of any agreement made between them for establishing a water station for the said company, at the aforesaid place; nor has he any particular knowledge of the examinations made by the said complainant, individually, or in concert with the agents of the said company, or others, upon the lands of this defendant or others, for the purposes of discovering water for the uses of the said road. But he believes that some such examinations were made, and that it was known to the said complainant that there were on the lands of this defendant, and convenient to the tavern stand of the complainant, springs of water, from which a supply might be obtained in requisite abundance for all the purposes of the said tavern stand, and of a water station of said company. This defendant denies that said land where the said springs existed, presented at the time of the pretended discovery thereof, no appearance of an open and running spring, available, in its then condition, for useful purposes; on the contrary, he avers, that on said land, at the very place indicated by the defendant in his bill, and at the very time of the said pretended discovery, there was, and for many years before had been, a spring of running water; which

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spring, at the aforesaid time, was used, and for many years before had been used by your orator and his family, and by the former owner of said land and his family, for the supply of water for all their domestic or family purposes; and this fact was well known to the said complainant at the time of his aforesaid pretended examination; and this defendant admits, that in the vicinity of the aforesaid spring the ground was damp, wet, and sobby, and indicated the presence or existence of other springs of water, which might be collected into one head and made available for the purposes of a water station, as aforesaid; but all this was before the time of said pretended discovery well known to this defendant, and might have been discovered by the complainant without encountering all the labor which he pretends that he devoted to the purpose. And this defendant admits, that after the complainant discovered that a supply of water for the purposes aforesaid, could be obtained from the aforesaid land of this defendant, he applied to this defendant for permission to collect said springs into one reservoir, on the land of this defendant, and thence to conduct them through the land of this defendant by suitable pipes, to the intersection of the aforesaid roads, and there to furnish a supply of water to the tank or water station there proposed to be built, offering at the same time to this defendant to pay to him so much as he reasonably deserved to have for said privilege, to which proposition this defendant acceded; but this defendant being at the time unable to say what sum he would demand for the privilege aforesaid, not knowing what would be the extent of loss and inconvenience to which he might thereby be subjected, it was agreed and understood between the said complainant and this defendant, that the former might enter on the lands of this defendant, and thereon erect a reservoir for the purpose of collecting said waters, and lay pipes through the lands of this defendant, for conveying said waters to the tank or reservoir to be erected at the water station of the said company, as aforesaid, and that at a future day this defendant and the said complainant should ascertain and fix the sum to which the said defendant should

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be entitled, as aforesaid. This defendant denies that he agreed to permit the said complainant to use his aforesaid springs for the purposes aforesaid, upon or with the understanding, that when the said springs were collected into a common reservoir, and the same walled up, that one half of said reservoir should be left open for the use of this defendant, and upon condition that the complainant would agree to indemnify this defendant for all damage that he might sustain in the opening of his ground for the purpose of laying down pipes to conduct the water from the said spring to the water station aforesaid; and he further denies that he required no other compensation for the use of the said springs in their then condition, than the use of one half of the spring, when it should, by walling and digging, as aforesaid, be made available for useful purposes, and an agreement, that the said complainant would indemnify this defendant for damages which he might sustain by laying down pipes as aforesaid; on the contrary, this defendant avers, that he did insist upon and require compensation to be made him by the complainant for the use of his aforesaid springs, and yielded to the complainant the privilege aforesaid, only in faith of the complainant undertaking to pay him therefor, so soon as the amount which he deserved to have could be ascertained, and that nothing ever passed between the said complainant and this defendant about dividing said reservoir; but for some time after the same was erected, it was open for the common use of this defendant and the said company, and afterwards, at the solicitation of an agent of the said company, this defendant agreed that the said company might divide the said reservoir, leaving open one part thereof, might cover in the other part thereof for their own use, and he denies that the arrangement between the said complainant and himself in reference to the damages which he should sustain, by the entering upon and opening his ground for the purpose of laying or repairing said pipes, was intended to affect his right to compensation for the use of his springs, as aforesaid, nor can it have any such influence; and this defendant avers, that agreeing with the complainant, as is here-

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in before admitted, and understanding that the *B. and O. R. R. Co.* desired some assurance that he had agreed to permit the water to be taken from his springs to the station of the said company, he did agree to write, and actually signed a letter to the President of said company, of which the paper JJJ, No. 1, and filed herewith as part of this answer, professes to be a copy; but, he submits, that the same does not profess to state the terms of the agreement between the complainant and himself, but simply admits the fact that an agreement between them had been made, and expresses the willingness of this defendant to abide by and execute the same; and this defendant denies that the complainant at the time aforesaid required him to make a conveyance for said springs, this defendant was not prepared at the moment to make any such conveyance, as he had no legal title to the land, and it was always expected by this defendant, that he was to be satisfied for his springs before he should be required to convey them to the complainant, and this defendant wrote the letter aforesaid in the confidence, that the said complainant would be as prompt to comply with his part of the agreement aforesaid, as this defendant. And this defendant admits, that after the receipt of the aforesaid letter, the said company proceeded to dig out and wall up the aforesaid spring, and some time afterwards, and after this defendant and the said company, had in common used the whole reservoir, the said company with the permission of this defendant, as aforesaid, covered over one half part thereof, and this defendant admits, that he has now in the other part of the said reservoir an abundant supply of water, but he insists that he had, before such improvement made, a sufficient supply for all his purposes; and that the water, which formerly was of the first quality has, by the walling up and introduction of metallic pipes therein, become greatly deteriorated, so that his condition at present is by no means as good as it was formerly. And this defendant also admits, that the said company has erected a tank for water, at the intersection of said roads, and laid pipes to lead the waters from said springs thereto, and has established a water station at the aforesaid place; and this

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defendant admits, that the said complainant executed to him the instrument, marked *Exhibit JJJ*, No. 2, and filed as part of this answer, but the same was intended merely to indemnify this defendant, from the damages which he might sustain from the agents of the company, in entering on his aforesaid lands, and opening the same for the purpose of laying or repairing the water pipes, as aforesaid, and was not intended to set out, nor does it set out, the terms upon which the use of his springs was to be given to the said complainant, as that contract was to be complied with as soon as the parties could determine what compensation was to be given to this defendant, it was not deemed important to reduce the same into writing; and this defendant admits, that after said agreement, the said complainant made considerable improvements on his aforesaid lands, and although he knows nothing of the agreement between the complainant and his lessee, he has yet no doubt and is willing to admit, that the said premises rent at this moment for more than they would rent in case the water station of the said company, now at the place, was broken up. And this defendant denies that he has obtained a legal title to said land, and even if he had, he admits that he would be unwilling to execute a conveyance of his springs to said complainant, and he denies his obligation to make any such conveyance until he is compensated, as well for the use of the springs, as for the injury he has sustained by the constructing of the reservoir and laying pipes through his lands, and he admits too, that he has given notice, as well to the complainant as to the company, of his aforesaid claims, and of his resolution to cut off the supply of water from said station, unless his reasonable demands are complied with; and he again denies that he conceded to the complainant the right or privilege of using said springs, in consideration of the advantage that he expected to derive from making the same available, as aforesaid, and of the agreement of indemnity, as aforesaid, and he begs leave to deny that he wishes to injure the property of the said complainant, or to deprive him of any of the advantages which he anticipated from his improvements thereon. He is willing to abide by his agreement, and he only

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requires that it may be executed by the said complainant, and this defendant denies all fraud with which he is charged, and prays that the injunction heretofore granted in the cause, may be dissolved, &c.

The *Exhibit JJJ*, No. 1, filed with defendant's, was a copy of the instrument sealed by him on the 25th September, 1835, addressed to *Philip E. Thomas, Esq.* (See page, 112.)

The *Exhibit JJJ*, No. 2, viz :

“Know all men by these presents, that I, *Trueman Belt*, of, &c., am held and firmly bound unto *Joseph J. Jones*, of &c., in the sum of \$3,700, to be paid to the said *J. J. J.*, his &c., which payment well and truly to be made and done, I bind myself, my &c., firmly by these presents, sealed with my seal and dated this 25th September, 1835.

Whereas the above named *Trueman Belt*, has contracted with the above named *Joseph J. Jones* for the exclusive use of his, (the said *Joseph J. Jones*,) springs, for the purpose of conveying water therefrom, for the use of the *Baltimore and Ohio R. R. Co.*, and the right to enter by such way as may be most convenient, and open a ditch to convey the water from said springs by pipes to the said *Belt's* new store. Now the condition of the above obligation is such, that the above named *Trueman Belt* shall, at all times, save harmless the said *Joseph J. Jones*, his heirs and assigns, and make good to him, or them, all the damages that he, the said *Joseph J.*, his heirs or assigns may sustain, by the said *Rail Road Company* entering upon the said *Jones' land*, for the purpose of opening the necessary conveyance of said water, as above specified, and also for entering thereon for the purpose of making any repairs that may ever be necessary, then the obligation to be void and of none effect, else to remain and be of full force and virtue in law.

TRUEMAN BELT, (Seal.)

Signed, sealed and delivered, in the presence of *Amos A. Williams.*”

The complainant then pleaded the general replication, and a commission was issued : so much of the proof as is essential, will be found in the opinion of this court.

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At July term, 1843, (BLAND,) Chancellor, decreed, that the injunction be made perpetual; that the defendant *Joseph J. Jones*, forthwith execute, acknowledge and deliver, according to law, a good and sufficient deed, conveying from him unto the plaintiff, *Trueman Belt*, his heirs and assigns, all right, interest and use, of, in, and to the lands in the bill of complaint mentioned, to the extent and upon the terms as therein set forth; and costs.

From this decree the defendant appealed to this Court.

The cause was argued before ARCHER, DORSEY, CHAMBERS, SPENCE, STONE and SEMMES, J.

By ALEXANDER for the appellant, and
By PRATT and LATROBE for the appellee.

DORSEY, J., delivered the opinion of this court.

The real question in dispute in this case, looking to the merits of the matters in controversy, is, whether agreeably to the contract between the parties, the appellee was bound to pay any thing to the appellant for the use made of his springs, and the water conveyed from them?

According to the contract alleged in the bill, no such payment was to be made. But this allegation is positively denied by the answer, which asserts, that the appellee applied to the appellant for permission to collect said springs into one reservoir, on the land of the appellant, and thence to conduct them through his lands by suitable pipes, to the intersection of the *Washington* branch of the *Baltimore and Ohio Railroad*, and the turnpike between *Baltimore* and *Washington*, and there to furnish a supply of water to the tank or water station, there proposed to be built; offering at the same time to the appellant, to pay him so much as he reasonably deserved to have for said privilege: to which proposition the defendant acceded; but that the appellant, being at the time unable to say what sum he would demand for the privilege aforesaid, not knowing what would be the extent of loss and inconvenience to which he might thereby

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be subjected, it was agreed and understood between the said appellee and appellant, that the former might enter on the lands of the latter, and thereon erect a reservoir for the purpose of collecting said waters, and lay pipes through the appellant's lands for conveying said waters to the tank or reservoir, to be erected at the water station of the said company as aforesaid, and that at a future day, the appellant and appellee should ascertain and fix the sum to which said appellant should be entitled, as aforesaid.

The argument on behalf of the appellant appears to assume, that it is requisite not only to remove the effect of the appellant's denial of the agreement charged in the bill, by the proof of two witnesses, or that of one witness and pregnant circumstances; but that it is requisite by like testimony to disprove the agreement, and its concomitant circumstances set out in the appellant's answer. The correctness of this assumption may well be questioned, when by adverting to the bill, it appears that the appellant was not called on to state what was the contract between the parties, but to admit or deny whether he made the agreement charged in the bill. To such a bill it can hardly be assumed, that the appellant's statement of the contract was simply responsive to that which he was called on to admit or deny.

There having been no exceptions taken in the court below, either to the admissibility of testimony or insufficiency of the averments in the bill, to which the testimony, is to be applied, let us see whether the appellee has proved a case in its general outlines or essential parts, correspondent with that stated in the bill: and in the next place let us inquire, whether the proof so offered is sufficient, also, to countervail the positive denial in the appellant's answer?

The nature of the transaction in question, makes it apparent, that the inspection of the springs by *Samuel Sprigg* and *Amos A. Williams*, two of the railroad directors, and the conversation then held with the appellant, was prior in point of time to any definite contract between him and the appellee; as the sole motive of the appellee to enter

into the contract, was to carry into effect a contract in regard to the erection of a water station by the *Rail Road Company*; which, of course, and as the testimony shews, it would not enter into, until it had ascertained that the supply of water was adequate. Until then, the company agreed to contract with the appellee, it cannot be presumed that he entered into any definitive contract with the appellant. The testimony of *Sprigg*, shows, that for the construction of the reservoir and use of the water, the appellant desired no compensation, unless he sustained an actual injury thereby; and at that time he could not conceive how he could be thus injured. Under such impressions, that he should in this respect have made the contract stated in the bill of complaint is in a high degree probable. But we think there is no room for conjectures or probabilities on the subject, when we advert to the appellant's exhibits JJJ No. 1, and JJJ No. 2, which in the view of a court of equity, constitute one written agreement between the parties in relation to the matters now in controversy. Instead of one written agreement, signed by both parties, each gave to the other an instrument of writing, containing the stipulations by which the subscribers were to be respectively bound. JJJ No. 1, enumerating the acts to be done by the appellant, and JJJ No. 2, the duties required of the appellee; in execution of their agreement, JJJ No. 2, disproves the statement of the agreement as made by the answer, sustains the allegation in the bill, that nothing was to be paid by the appellee to the appellant, for the use of the springs and the water, and of itself outweighs the positive denial of that fact by the answer. It is not pretended by the answer, nor has any proof been offered to establish it, that there was any separate stipulation for the payment of the amount of damages done to the springs, and of the value of the abstract privilege of using the water. The answer itself repudiates such an idea. If then, it were the design of the appellant to insist on such a claim, for what conceivable reason was such a stipulation left out of JJJ No. 2. There is no allegation that it was done by fraud or mistake. We must there-

fore regard such a claim as forming no part of the contract between the parties.

Having expressed our opinion as to the merits of this controversy, we will now consider some of the objections, taken by the appellant to the chancellor's decree, most, if not all of which, are rather of a technical character, than otherwise. And first, as to the appellant's objection to the decree, that it has been passed against the positive denial in the answer of the contract stated in the bill, which denial has not been contradicted or outweighed by the proof of two witnesses, or one witness and pregnant circumstances, according to the well established principles of a court of equity. In answer to this objection we have only to say, that the principle on which it is predicated is not one of universal application, though undeniably true as a general rule; yet to the circumstances of this case it has no application. Here the two papers which this court have declared constitute the agreement of the parties were exhibited, and admitted, in the appellant's answer, and are sufficient to control the denials in the answer, without the aid of any oral testimony in their support. The cases, to which the rule was intended to apply, must be those in which the facts denied, depended on oral only, or oral and circumstantial evidence; not where they were conclusively proved by the production of the written contract of the parties. Nor are the exceptions to the rule confined to cases where the contract denied has been formally signed and executed by the parties. As for example; suppose a verbal contract were made, to which no witness could testify, and never had been reduced to writing, and executed as the agreement of the contracting parties, and a complainant charging and seeking the performance of such contract, were to exhibit with his bill twenty letters written by the defendant to third persons, stating the contract in every particular: all of which letters were admitted to be genuine by the answer; which however denied the contract. Could it be contended that such letters would be less satisfactory than the proof of twenty witnesses who may have heard the defendant, on one

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occasion only, state or admit the same facts that were contained in the letters? Or that although the proof of two such witnesses would be sufficient to entitle the complainant to the decree he sought, yet that the twenty letters would not? The absurdity of applying this Chancery rule to such a case is too glaring to be countenanced for a moment.

Another objection urged to the Chancellor's decree, is that it enjoins the execution of a conveyance by the appellant before he has acquired a legal title to the premises to be conveyed; upon the acquisition of which title only he bound himself to convey. If this objection as to want of title were made by a vendee, against whom a decree for the specific performance of a contract of purchase was sought, it would be insuperable in ordinary circumstances. As ordinarily a Chancery court would not compel a purchaser to pay the purchase money, and accept a defective title. But what interest the vendor has in setting up a defect in his own title, as a bar, to a conveyance called for by a vendee, who is willing to accept such defective title, it is difficult to conceive. He certainly cannot be prejudiced by such a conveyance, and consequently it forms no ground for the reversal of the Chancellor's decree at his instance. And such a defence comes with a bad grace from the appellant, after having nine or ten years before executed his exhibit J J J, No. 1, and without having assigned any reason or apology for his having so long neglected to perfect his title.

The next objection raised to the decree is, that it is too vague and uncertain in defining the thing to be conveyed, and that it directs the conveyance of the title of the appellant to all the lands mentioned in the complainant's bill.

We do not think the decree, upon a fair interpretation of it, obnoxious to the exceptions thus taken to it. It refers to the bill, as showing the lands on which the conveyance was to operate, and the extent of the right or interest intended to be transferred. From the nature and circumstances of this whole transaction, it is manifest, that it was not necessary nor intended that there should be a conveyance of the land itself; but of a mere

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privilege or easement exercisable upon, or flowing out of the land to which it was applicable. As this contract was made for the purpose of securing a beneficial easement to the rail road company, and as the rail road company, by its agents, have contracted with the appellant, that one half of the reservoir should be left open for the use of the appellant, to which the appellee hath assented, it is right and proper that the conveyance directed by the said decree, should make provision for the same; and should also secure to the appellee the privilege of entering on the lands of the appellant, for making all necessary repairs to the pipes conveying the water from the reservoir to the water station, upon the said appellee, his heirs, executors, administrators or assigns, thereafter paying to the said appellant, his heirs and assigns, for the damage done to him or them, as the case may be, by the making of the said repairs; and should also secure to the said appellees, his heirs and assigns, an entry upon the said lands of the appellant for the purpose of making the necessary repairs to the said reservoir, and rendering it effective for the purpose for which it was constructed. And for the purpose of providing for these objects and removing all doubt as to the nature of the interest in the lands of the appellant, designed to be conveyed to the appellee, this court will sign a decree affirming the decree of the Chancellor, with costs, and making the appropriate additions thereto, to accomplish the objects aforesaid. For the recovery of the damages, if any, which the appellant has sustained by the laying down of the pipes by which the water is conveyed from the reservoir to the water station, he is left to his remedy upon his exhibit J J J, No. 2.

DECREE AFFIRMED.

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WASHINGTON JONES, ET AL. vs. WILLIAM PLATER, ADM'R
OF JOHN R. PLATER.—*December 1844.*

Upon a contract to sell a part of a tract of land called *G. Manor*, supposed to contain 988 1-2 acres, *more or less*, at the price of nine dollars per acre, the parties intended that the number of acres should be fixed by the contract, and not by subsequent measurement. Unless the words *more or less* lead to such a conclusion, they are useless and insensible; made in good faith, they qualify the representation of quantity.

A contract must be interpreted by its terms.

When a tract of land is sold, supposed to contain 998 1-2 acres, *more or less*, the number of acres is not of the essence of the contract; and a deficiency of 55 acres in such a case, is not of such a character as to induce belief of fraud or mistake.

APPEAL from the Court of Chancery.

The bill was filed by the appellee on the 9th October 1832, and alleged that *John R. Plater*, on the 30th November 1817, sold to a certain *John Darnall*, a part of a tract of land called "*Great Elkton Head Manor*," containing 988½ acres, MORE OR LESS, at and for the sum of \$9 per acre, as per exhibit A. That *J. D.* paid a part of the purchase money, and died. The appellants were his personal representatives. The bill prayed a discovery of the assets of *Darnall's* estate, and payment of a balance of purchase money, after an account had between the representatives of the parties to the original contract, and in case of deficiency of personal assets, a sale of the land, the equitable title to which had descended to various minors and femes covert.

EXHIBIT A—*Filed with the Bill.*

This agreement and covenant between *John Rousby Plater*, of, &c., on the one part, and *John Darnall*, of &c., of the other: witnesseth, that the said *John R. Plater* sells to the said *John Darnall*, a part of a tract of land called *Great Elkton Head Manor*, including the mill seat and mill, supposed to contain nine hundred and ninety-eight and a half acres, *more or less*, at the price of nine dollars per acre. The said *Darnall* binds himself to make the following payments on the

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1st January 1817, the sum of \$2,000; and the balance of the purchase money in two equal annual payments, from the 1st January 1817, with the legal interest annually on the whole balance unpaid, and the aforesaid *J. R. Plater* obliges himself to convey in fee to the said *John Darnall*, on the payments being completed, each party having a copy of this bargain and agreement, dated this 30th day of November 1816.

J. R. PLATER,

JOHN DARNALL.

After the bill had been taken *pro confesso*, under an order of publication against some of the defendants, the answers of the infant defendants taken by guardian, others of the defendants answered the bill and admitted the contract of 1817, and alleged that a resurvey of the land was made by and with the consent of *J. R. P.*, about the 1st April 1829, by which it appeared the land contained 943, instead of $988\frac{1}{2}$ acres. The defendants claimed a reduction in price for $55\frac{1}{2}$ acres, at \$9 per acre, and controverted the state of the accounts as mentioned in the bill of complaint, denying insufficiency of assets to pay the sum really due, but admitted there was nothing beyond that sum.

A commission was then issued, proof taken, and the cause referred to the auditor, who stated an account showing \$2,355. 23 due the complainants, on the basis of a sale of $989\frac{1}{2}$ acres at \$9.

It was agreed that the only question to be presented to the Chancellor was, whether the defendants were to be charged with the quantity of $998\frac{1}{2}$ acres, at the price of \$9, as claimed by the plaintiff, or with 943 acres as alleged by the defendant.

On the 2nd March 1843, the Chancellor (BLAND,) affirmed the auditor's report, and decreed, that unless the sum due should be paid by, &c., the land should be sold for the purpose of paying the complainant.

From this decree the defendant appealed.

The cause was argued before ARCHER, DORSEY, CHAMBERS, SPENCE, STONE and SEMMES, J.

By A. RANDALL, for the appellants, who cited: 3 *Stark. Ev.* 1043, 1044; 5 *Cranch*, 234; 1 *Cain S. C. R.* 168; 18 *John.* 73; 5 *G. & J.* 147; 7 *G. & J.* 331; 4 *Wendell*, 58; 19 *Wendell*, 320; 11 *G. & J.* 314; 2 *Sto. Eq.* 53, 69; 15 *Ves. Jr.* 516; 1 *Ves. & Bea.* 524; 2 *John.* 37; 4 *Hen. & Mun.* 82; *Sugden on Ven.* 102.

By J. JOHNSON, for appellee, who cited: 4 *Mason*, 417; 1 *Ves. & Bea.* 375; 6 *Bin.* 102; 4 *G. & J.* 478, 488; 4 *H. & J.* 278; 6 *Harr. & John.* 24.

ARCHER, J., delivered the opinion of this court.

The determination of this case depends on the construction of the contract of the parties, of the 30th of November 1816. The question to be decided is, whether the parties intended that the number of acres should be fixed by the contract, at 998½ acres, or whether it was designed that the quantity should be ascertained by measurement and paid for, according to the number of acres the land should actually contain? The words of the contract are: “the said *John R. Plater* sells to the said *John Darnall* a part of a tract of land called *Great Elkton Head Manor*, including the mill seat and the mill, supposed to contain 998½ acres, more or less, at nine dollars per acre.” The insertion in the contract of the terms *more or less*, induces us to believe it to be the intention of the parties that the land to be paid for was 998½ acres; and not that the quantity to be paid for, was to be that which it should be found actually to contain. Unless the words “*more or less*” lead to such a conclusion, they are useless and insensible. The contract must be interpreted by its terms, and from an examination of its terms alone, we have arrived at the conclusion above stated.

If it were competent to look out of the instrument, the intention of the parties clearly appeared on the first of November 1816, by the agreement of that day, that the sale should be of 998½ acres, at \$9 per acre, whether it contained more or less; and we do not see in the agreement of the 30th, any

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change of intention, although the design of the parties is not so clearly and decisively expressed. The letters of *Mr. Plater* if used in evidence, show nothing to the contrary; the land sold was part of a tract from which other sales had been made, and a survey was necessary to enable *Plater* to convey, as he would be bound to do on the payment of the purchase money. If he therefore joined in the survey, or aided in it, no inference against the above interpretation could be deduced from such conduct.

The land thus appears to have been sold by estimation; and so much is to be given by the acre for the quantity, *more or less*. The quantity of acres was manifestly not considered as of the essence of the contract, neither warranted on the one side, nor demanded on the other. The deficiency in the quantity is inconsiderable, and is not of such a character as to induce the belief of fraud or mistake. We cannot more intelligibly express our views, than in the language of *Judge Story*: “There is much good sense in holding that the words *more or less*, or other equivalent words, used in contracts or conveyances, should be construed to qualify the representation of quantity, in such a manner, that if made in good faith neither party should be entitled to any relief on account of a deficiency or of a surplus.” 4 *Mas.* 417. We therefore think, this is no case, for an abatement of the purchase money.

The agreement in the record would seem to preclude the examination of any other questions, than those which we have examined.

DECREE AFFIRMED.

HENRY TIFFANY vs. JOHN SAVAGE.—December 1844.

Where a plaintiff contracts with the defendant's agent, in an action on the contract, it is necessary to give proof that the agent had some authority.

Although upon the whole testimony in a cause, on both sides taken together, the conclusions of a judge might be, if acting as a juror, that the verdict should be for the defendant, yet if there is evidence legally sufficient to warrant the jury in finding for the plaintiff, when left unaffected by the defendant's proof, the court will not say to the jury upon the motion of the defendant, that there is no evidence in the cause, or that the plaintiff's cause is not proven.

APPEAL from *Washington* County Court.

This was an action of *assumpsit*, for goods sold and delivered. The defendant pleaded *non assumpsit*, &c.

The plaintiff to support the issue on his part joined, gave in evidence the following account, and affidavit attached to it, for goods, wares, and merchandise, viz :

“*Baltimore*, September 22, 1838.—*Mr. John Savage*, by *Lewis M. Hughes*, bought of *Henry Tiffany*, 2 pieces 3-4 check, 81 at 10 \$8.10, &c., \$260.07.” &c.

The plaintiff by his counsel, then read in evidence to the jury certain interrogatories, by him filed in this cause, as follows, &c.

And the answers to said interrogatories by *Lewis M. Hughes*, a competent witness, sworn and examined on the part of the plaintiff, as follows :

1st. In the month of September 1838, I went to *Henry Tiffany's* and bought the goods in the name of *John Savage*.

2nd. I told the plaintiff, the said *Henry Tiffany*, that the goods were for *John Savage*, and had them directed to his iron works in *Pennsylvania*, to the care of his clerk, I think.

3rd. I believe the account as exhibited to me, is a true account of the goods purchased from said *Tiffany* for *John Savage*.

4th. I did receive a letter from said *Savage* in reference to said goods. I decline attaching the said letter to the deposition, because a portion of it is separate and distinct from the

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transaction, and is private. The annexed statement, is a full, perfect, entire and true copy of that portion of the letter, in the handwriting of said *Savage*, relating to this transaction: "Why not answer *Longhead's* letter about the number of boxes forwarded; the bill of lading calls for 13 boxes, marked *A. McCallister, Huntingdon*. 19 bags of coffee, 2 bbls. sugar, marked *John Savage*. There was, likewise, a bale of goods marked *A. McCallister*, not entered on bill of lading. Really, it is too bad, to receive goods shipped, as you stated in your letter, on the 24th September, on the 8th day of October; a voyage to the *West Indies* could be accomplished before. Extreme inattention was to be found somewhere; three days ought have sufficed. No numbering of boxes, no notice of the bill of goods, &c. You put no card on the boxes as I requested."

5th. I have the letter in my possession, and the answer to the fourth interrogatory is my answer to this.

6th. The letter referred to, did acknowledge the receipt of the goods, with the exception of one package, which said package, deponent since learned, had been received by said *John Savage*.

7th. I did direct the said plaintiff to charge the goods to the said *Savage* at the time they were purchased.

The defendant then read in evidence to the jury, interrogatories by him filed in said case, as follows, to be propounded to *Lewis Hughes* and to *Holker Hughes*, as witnesses to be examined on the part of the defendant.

And the answers to said interrogatories by *J. Holker Hughes*, a competent witness, sworn and examined on the part of the defendant, as follows:

1st. I had purchased from *John Savage*, (the defendant above referred to,) a certain lot of blooms, and undertook to procure for him, and to pay for goods to be purchased in *Baltimore*. I think I gave instructions to *Lewis M. Hughes* (my agent in *Baltimore, Maryland*,) to purchase such goods as *John Savage* might require, from any house with which I was in the habit of dealing. The bills of those goods, or copies

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of them, were rendered to me, and duly charged to said *Savage*, the defendant, on the "*Mont Alto*" furnace books, and on said books properly credited, among which said bills so credited and charged, was one from *Henry Tiffany* for the goods above referred to and received by said *Savage*. The reason I undertook to pay for the blooms, purchased by me from said *Savage* in merchandise, was, that I had been dealing for a number of years in *Baltimore*, and had credit with merchants, among whom was said *Henry Tiffany*, and said *Savage* wanted goods, and was willing to receive them in exchange for the blooms above referred to, he being unacquainted with the merchants of *Baltimore*. The bill shown to me, and attached to interrogatories, and bearing date the 22nd September, 1838, which said interrogatories are signed by *D. G. Yost, esquire*, as counsel for plaintiff, is, I think, the amount of the bill rendered to me, and credited on "*Mont Alto*" furnace books to the aforesaid *Henry Tiffany*.

The plaintiff then read to the jury in evidence, the answers of the said *Lewis M. Hughes* to the above mentioned interrogatories, filed by the defendant, as follows:

1st. I purchased the goods upon the authority of a letter from *Holker Hughes*, who directed me to have them charged to *John Savage*.

2nd. I do not recollect of stating at whose instance the goods were purchased at the time I ordered them.

3rd. In answer to this interrogatory, I refer to my answers to fourth, fifth and sixth interrogatories on the part of plaintiff.

4th. It was in compliance with the instructions from *Holker Hughes*, referred to in answer to first interrogatory.

Whereupon the defendant, by his counsel, prayed the opinion and direction of the court to the jury from the evidence above set forth, the plaintiff is not entitled to recover, because it is not proved by said evidence that the said *Lewis M. Hughes* was the authorized agent of said defendant in purchasing said goods, wares and merchandise from said plaintiff, and forwarding them to said defendant; which opinion and direction the court gave. The plaintiff excepted and appealed to this court.

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The cause was argued before ARCHER, DORSEY, CHAMBERS, STONE and SEMMES, J.

By D. G. YOST, for the appellant, and

By PRICE, for the appellee.

SEMMES, J., delivered the opinion of this court.

The question for our decision in this case is, whether upon the facts proved on the trial below, the court erred in not leaving it to the jury to decide the issue between the parties?

The suit was brought by *Henry Tiffany* against *John Savage*, to recover the price of a certain quantity of goods, which had been purchased of the plaintiff by a certain *Lewis M. Hughes*, and forwarded to the defendant. The testimony offered by the plaintiff, consisted of an account with a probate thereto annexed, and of the deposition of the said *Lewis M. Hughes*, which had been taken, together with the deposition of *Holker Hughes*, the defendant's witness, under a commission issued for that purpose. The account was headed thus,

“BALTIMORE, Sept. 22nd, 1838.

“*John Savage*, by *Lewis M. Hughes*,

Bought of *Henry Tiffany*.”

Then follows the items, amounting in all, to \$260.07. To this account is annexed the affidavits of the plaintiff and his clerk, *George Stanard, jr.*, proving the correctness of the same, in the usual way; and that it remained unpaid. The deposition of *Lewis M. Hughes*, stated in substance, that he had purchased the goods from the plaintiff in the name of the defendant, and that he told the plaintiff the goods were for the defendant. That deponent had them directed to the defendant's iron works, in *Pennsylvania*, and that he afterwards received a letter from the defendant, in which he complained of delay in the arrival of the goods, and of a want of attention through some one's fault, in his not receiving proper information in respect to the same; that said letter acknowledged the receipt of the goods, with the exception of one package, which deponent afterwards learned had been received by the defendant. But it was shown

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by the deposition of *Holker Hughes*, the defendant's witness, that the said *Holker Hughes* had purchased of the defendant a certain lot of blooms, and had undertaken to pay for them in merchandise, to be procured in *Baltimore*. That he accordingly gave instructions to the said *Lewis M. Hughes*, (deponent's agent in *Baltimore*,) to purchase such goods as the defendant might require, from any house with which deponent was in the habit of dealing. That the goods were purchased as ordered, and bills for the same rendered to deponent, with which the said defendant was duly charged, &c., on the books of the "*Mont Alto*" furnace; that amongst the bills so rendered and charged, was the bill of *Tiffany*, the plaintiff, for the goods bought of him, as aforesaid, by the said *Lewis M. Hughes*; and upon the whole evidence, the defendant by his counsel, prayed the opinion and direction of the court to the jury, that the plaintiff was not entitled to recover, because it was not proved that *Lewis M. Hughes* was the authorized agent of said defendant, in purchasing said goods from the plaintiff, and forwarding them to the defendant, which opinion and direction the court gave; and it is contended, that the court by thus taking all the facts within its own exclusive cognizance, usurped the province of the jury, and decided upon the "measure and quantity of the proof," as a question of law. Let us see whether the judgment of the court below, is obnoxious to the objections which have been urged against it. It was certainly necessary, in order to entitle the plaintiff to recover, to establish the fact that the said *Lewis M. Hughes* had some authority, either express or implied, from the defendant, to act as his agent in purchasing the goods. And, if the court below was right, in granting the defendant's prayer, we must conclude that the evidence offered by the plaintiff, taken by itself, was legally insufficient to warrant the jury in finding that fact. See the case of *Cole, vs. Hebb, adm'r. d. b. n. of Wm. Gwyther*, to be found in 7 *Gill & John.*, 20. But we are not warranted in coming to such conclusion, from the testimony offered by the plaintiff in this cause. The account, which we find in the record, with the joint affidavits of the

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plaintiff, and his clerk, *George Stanard, jr.*, thereto annexed, as aforesaid, shows on its face to be an account by the plaintiff, against the defendant, for goods sold and delivered, and is the plaintiff's identical cause of action in this suit. This account, it appears, was suffered to go to the jury as evidence; to which is to be added, on the part of the plaintiff, the deposition of *Lewis M. Hughes*. Now, notwithstanding it may be true, that if the whole testimony, in the cause on both sides, be taken together, our conclusion might be, if sitting as a jury, that the verdict should be found for the defendant; yet seeing, as we do, that there was evidence offered by the plaintiff, legally sufficient to warrant the jury in finding the issue, which it was offered to sustain; testimony, which if left unaffected by the defendant's proof, would have been conclusive in the plaintiff's favor; we are of the opinion, that the court below erred in granting the defendant's prayer.

We therefore, reverse the judgment, and order a procedendo.

JUDGMENT REVERSED.

DAVID RIDENOUR, ET AL., vs. THOMAS KELLER, SHERIFF
OF WASHINGTON COUNTY.—*December 1844.*

A sheriff who has made a levy upon personal property, under a writ of *fiery facias*, in good faith apprehending danger of loss by reason of the conflicting claims made upon it, is entitled to have the title of the claimant settled in equity, and be protected in the mean while by injunction.

The accounts of an administratrix, making a distribution of her intestate's estate in money, no creditor nor fraud appearing, will not, after a lapse of sixteen years, be disturbed in equity, where she was guardian to her infant children, and paid them the interest on the sum distributed to them during her life, and her successor in the guardianship received the amount distributed, from her personal representative, though she had taken to her own account, certain portions of her intestate's estate at their appraised value, which portions remained in *esse* at the time of her death.

The court will presume that distribution of an intestate's estate, had, after a lapse of four years, been made, where creditors were not interested; no charge of fraud made; and it appearing that, all the distributees had received their proportions of the appraised value of the estate in money, and some of them had disposed of the same.

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Where an administratrix took a portion of her intestate's estate, to her own account, at the appraisement, and paid the distributees their portions of the estate in money, which they kept for four years, and alleged no fraud; the distributees, seeking to set aside her settlements, must first do equity, and return what they have received, or offer so to do.

APPEAL from the Equity Side of *Washington County Court*.

The bill, in this cause, was filed on the 14th June 1842, by *Thomas Keller*, sheriff of *Washington county*, and alleged, that a judgment was rendered in *W. county court*, at March term 1839, against a certain *Abraham Barnes* and *Melchior B. Mason*, in favor of a certain *David Ridenour*, for, &c., which judgment, was afterwards entered to the use of *Lot Ensey* and *Christian D. Fahnestock*, late partners, trading under the name and firm of *Lot Ensey and Company*, who became, and are the equitable assignees of said judgment. That on the 25th day of February 1841, a *fi. fa.* was issued upon said judgment, directed to *John Carr, esq.*, then sheriff of said county, and the same day delivered to him; that afterwards, and before the return day of said execution, the said *John Carr* levied upon a large number of negroes, and other personal property, which was shown to him by the plaintiff, in said execution, and alleged to be the property of the said *Abraham Barnes*, and *Melchior B. Mason*, or one of them; that a part of the personal property mentioned in said levy list, was admitted to be the property of said *Barnes* and *Mason*, or one of them, which part was afterwards sold by the said *Carr*, as sheriff, by virtue of said *fi. fa.*, a true list of said articles, so admitted and sold, is herewith exhibited; that afterwards, on the 4th February 1842, the said *John Carr* departed this life, before the term for which he had been elected and commissioned as sheriff, had expired; that a few days thereafter, your orator was duly commissioned as sheriff of said county, gave bond, accepted the office, and was, in all respects, qualified according to law. That letters testamentary on the personal estate of said *Carr*, were, afterwards, granted to *James Dixon Roman*, who accepted the trust, and within twenty days thereafter, delivered over to your orator the said writ of *feri facias*,

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together with the said levy list, and the list of appraisement, and all other papers connected with, or relating to said writ; which your orator duly accepted. Whereupon, it became the duty of your orator, to proceed as the said *Carr* should have done; that the return day of said writ has been extended from time to time, at which it was originally returnable, until now, when it stands extended until the first day of *August* next; that the said property, mentioned in the said levy list, except the part so sold as aforesaid, has been, and is claimed by several other persons, and denied to be the property of said *Barnes* and *Mason*, or either of them: some of said claimants claiming separate and distinct articles, and some of them claiming in opposition to each other. And your orator begs leave to state briefly, the nature of the several claims, so that your honors may see the great difficulty in which your orator is placed, and the utter impossibility of deciding to whom the property belongs, and thus avoid danger and loss to himself, without the aid of this honorable court. Your orator is informed, and believes, that most of the articles mentioned in said levy list, except those sold as aforesaid, were formerly the property of *John Thomson Mason*, of said county, who departed this life intestate, on or about the month of December 1824; that letters of administration on his personal estate were granted to his widow, *Elizabeth Mason*; that she, as administratrix, took possession of the personal estate of said deceased, consisting of most of the articles now disputed in said levy list, together with a large amount of other property of great value; that she, the said *Elizabeth Mason*, made no distribution of the said personal estate, at least, of that portion contained in said levy list, nor did she make sale thereof, but charged herself with the whole amount at the appraised value thereof, and retained the same in possession until her death, which occurred in the month of May or June, 1836. That soon after her death, the said *Abraham Barnes* and *Melchior B. Mason*, obtained letters of administration on her personal estate, and proceeded to make settlement thereof; that they distributed a part of said negroes amongst the heirs of the said *Elizabeth*, and retained

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the balance of said personal estate, charging themselves therewith, in their settlements with the Orphans' court, at the appraised value thereof, and retained possession of the said property, with which they had so charged themselves. And your orator further states, that afterwards, on the 9th January 1839, the said *Abraham Barnes*, *Melchior B. Mason*, and a certain *John Thomson Mason*, their brother, executed a certain deed of trust to *John M. Gordon* and *William Schley, esqrs.*, for certain purposes therein mentioned, and conveyed to them a large number of negroes belonging to said parties grantors respectively, and which deed also conveyed the negroes mentioned in said levy list; that afterwards, on the 15th May 1839, the said *A. B.*, *M. B. M.*, and *J. T. M.*, executed another deed of trust, for other purposes therein particularly mentioned, conveying the same negroes, by name, to the said *J. M. G.* and *W. S.*, trustees, including the said negroes on said levy list; that the said *J. M. G.* and *W. S.*, now claim title to the said negroes mentioned in said levy list, by virtue of one or both the said deeds of trust, aforesaid, alleging, that the said negroes were the property of said *Barnes* and *M. B. Mason*, or one of them; and the title thereto was by said deeds of trust vested in them, the said trustees, for a purpose therein specified, which, has not yet been accomplished or fulfilled; and the said *J. M. G.* and *W. S.*, have forbidden your orator, at his peril, to sell any one of said negroes; and your orator further states, that afterwards, on the 11th October 1839, aforesaid, the said *A. B.*, and *M. B.*, his wife, *M. B. M.*, and *J. T. M.*, executed a certain other deed of trust to *William Price, esq.*, and *David G. Yost*, as trustees, conveying a large amount of property, real, personal, and mixed, including all the other negroes mentioned in said levy list, and also many other articles therein, in said list enumerated, to the said *Price* and *Yost*, as trustees, for certain purposes therein mentioned. And your orator states, that the said *W. P.* and *D. G. Y.*, as trustees, claim a large portion of the property mentioned in said levy list, under and by virtue of the said deed of trust, insisting, that they have the legal title to the same, and have for-

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bidden your orator to sell any part of said property which is contained in said deed of trust; that afterwards, on the 12th November 1841, letters of administration, *de bonis non*, on the personal estate of the said *J. T. M.*, deceased, were granted to one *John Winter*, who accepted the trust; and now, he, the said *John Winter*, as administrator *de bonis non*, claims all the property, or nearly all, mentioned in said levy list, except the part sold as aforesaid, as the property of the said *J. T. M.*, which was not administered by the former administrator, *Elizabeth Mason*, in her life time, and insists, that the said *Elizabeth*, by charging herself with the said property, and having made no sale or distribution, did not vest the title to said property in herself, but that it remained in her hands, as administratrix, until the time of her death; and therefore, the said *A. B.* and *M. B. M.*, as her administrators, had no right to, or control over, the said property; and, that the said *John Winter*, as administrator *de bonis non*, is solely entitled to the same, for the purpose of sale or distribution, according to law; and he claims the same in opposition to all others, and has forbidden your orator, at his peril, to remove or sell any part of that, which originally belonged to his said estate. And your orator further states, that some time in the month of *November* 1841, the letters of said *Barnes* and *Mason*, as administrators of the said *Elizabeth Mason*, were duly revoked, and that on the 30th day of the same month, letters of administration, *de bonis non*, upon said estate, were granted to the said *John Winter*; that a part, or few of said articles mentioned in said levy list, are represented as having belonged to the said *Elizabeth*, in her own right, and that the mode of settlement adopted by her said administrators was illegal and void, and did not vest the title to such property in them; and insists, that he, as administrator *de bonis non*, is entitled to the same, as the unadministered estate of the said *Elizabeth Mason*, deceased; and now claims the same, and has forbidden your orator to sell the articles thus claimed, which your orator cannot precisely enumerate. And your orator further states, that the said *David Ridenour*, the legal plaintiff, and *Lot Ensey*, the surviving partner of the

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said *L. E. and Co.*, insist, that the said property is the property of the said *Barnes* and *Mason*, or one of them, and require your orator to sell it as such, and by virtue of the said writ of *fi. fa.*, and threaten your orator with a suit for damages, if he returns said writ, *nulla bona*. And your orator further states, that the former sheriff, the said *John Carr*, in his life time, summoned a jury of inquest, who were duly empannelled and sworn, to try and determine the title to said property; that a trial was had, wherein each of the said several claimants were represented by counsel, except the said *Gordon* and *Schley*, trustees as aforesaid, and the said jury rendered a verdict, which is herewith exhibited; but your orator is advised, that such verdict is, in law, no protection to him against the said several suits threatened, and which may be brought by the said parties. And your orator is advised and believes, that he cannot, safely to himself, either sell the said property, or return the said writ, *nulla bona*, but that the said several claimants ought to interplead together, touching their right to said property, in order that your orator may know to whom the property belongs, and whether the said *A. B.*, and *M. B. M.*, or either of them, have any, and what interest therein, which your orator can sell by virtue of said execution; and that the said several claimants ought, in the meantime, to be restrained by the order or injunction of this honorable court, from commencing or prosecuting any action at law against your orator, touching the premises; and especially, that the said plaintiff, in the said writ of *fieri facias*, to wit, the said *D. R.*, and the said *L. E. and Co.*, should be restrained from any proceedings to compel your orator to return said writ of *fi. fa.*. In tender consideration whereof, &c. Prayer in conformity to the bill.

The defendants answered this bill. A variety of accounts, and the deeds of trust, &c., were filed as proof, but the nature of the defence made, and the facts established, sufficiently appear in the opinions of *Washington* county court and of this court.

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At March term, 1843, *Washington* county court, (T. BUCHANAN, A. J.,) delivered the following opinion :

The facts, as they appear from the admissions in the answers, or from the exhibits filed therewith, appear to be these.

John Thomson Mason died in 1824, leaving a large personal estate; his widow, *Elizabeth Mason*, administered on his estate, and returned an inventory and appraisement; she afterwards settled an account, charging herself with all the property contained in the inventory at its appraised value, and of debts; and distributed the cash balance amongst the heirs. There was no sale or distribution of the property, but the widow retained the possession of it until her death, in July 1836.

After her death, letters of administration, on her estate, were granted to *A. Barnes* and *M. B. Mason*, who, returned an inventory and appraisement of her estate, which consisted, almost, exclusively of the same property which she had charged herself with, as administrator of her husband. The said *Barnes* and *Mason*, made no sale or distribution of property, but charged themselves with the whole amount, at the appraised value, and after taking credit for the payment of debts, distributed the balance of value amongst the heirs; and afterwards, as a mode of paying said distributive shares, they distributed certain of the negroes to the several heirs, at a value fixed upon by appraisers, approved by the Orphans' court, for that purpose. The said *Barnes* and *Mason*, retaining all the other property, and a large number of the negroes; and after several deeds of trust, mortgaging the same for payment of certain debts.

The negroes, and other property have been levied upon by the sheriff as the property of said *Barnes* and *Mason*, under an execution against them, at the suit of *D. Ridenour*, use of *Lot Ensey and Company*.

It further appears, some of the heirs were minors, and the youngest did not attain the age of twenty-one years, until before the said levy was made; and, that soon afterwards, in November 1841, letters of administration, *d. b. n.*, on the estate of *John Thomson Mason*, were granted to *John Winter*, one of

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the defendants, and that soon afterwards, letters of *ad. d. b. n.*, on the estate of *Elizabeth Mason*, were granted to the same person; and he claims the greater part of the property, as the unadministered property of *John T. Mason*, and a small part as the property of *Elizabeth Mason*.

The plaintiffs, in the execution, claim it as the property of *Barnes and Mason*.

William Schley and *John M. Gordon*, claim the negroes under the deeds of trust, exhibited.

And *Wm. Price* and *D. G. Yost*, claim many of the negroes under the deed of trust to them.

The question is, to whom does the property belong?

It is the opinion of the court, that *Mrs. Mason* had no right to charge herself with the personal estate of her husband, *Jno. Thomson Mason*, at the appraised value; and, that by so doing, she acquired no title to the property; but, she held the same as administratrix, and, at her death it remained as the unadministered estate of her husband, *John T. Mason*; and that *Barnes and Mason*, as her administrators, had no right to the same, and ought not to have included it in their inventory; after her death no legal title could be claimed, except by an administrator *de bonis non*, on his estate; and it follows, that all the distributions and settlements of the said property by her administrators were wholly void; and *John Winter*, as administrator, is now entitled to all the articles embraced in the levy which were the property of *Jno. Thomson Mason*, deceased. But *Elizabeth Mason*, appears to have been possessed of a small personal estate at the time of her death, which she had in her own right. But the administration, on her estate, seems to have been irregular and void in the same particular; they had no right to charge themselves with the appraised value of the property, and acquired no title thereby, and therefore, all those articles in the said levy, which belonged to her, are properly claimed by her administrator *de bonis non*. There is some difficulty about the negro man *John Robinson*: it is alleged, that he belonged to *Elizabeth Mason*, but was not returned in the inventory of her estate, through error or mis-

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take, whilst the creditors allege, he belonged to *Barnes*. It is not necessary to decide this question, because he is included in the deeds of trust to *Gordon* and *Schley*, the purposes of which have not been accomplished; and, also, in the deed to *Price* and *Yost*; and, therefore, even if he was the property of *Barnes*, those grantees are now owners; and the sheriff had no right to levy upon him. There is, also, some difficulty about the silver plate, which *D. Ridenour* alleges to have been the property of *Richard Barnes*, and bequeathed to *Abraham Barnes* by his will, an extract of which is exhibited. *John Thomson Mason* was the executor of that will, and there is no evidence in the cause to show, that he ever assented to the bequest, nor that *Abraham Barnes* ever claimed it. The court is of opinion, that the only mode in which title to that plate can be acquired, is through an administrator *de bonis non*, with the will annexed, on the estate of *Richard Barnes*. If these principles be correct, and it is believed they are so, it follows, that *Abraham Barnes* and *Melchior B. Mason*, had no title to any of the articles now in dispute in this cause; and, that the sheriff had no right to take the same, under the execution against them.

It is thereupon, this 11th day of April 1843, by the court adjudged, ordered, and decreed, that *Thomas Keller*, release all the property mentioned in his bill of interpleader; and it is further adjudged, ordered, and decreed, that the defendants *David Ridenour* and *Lot Ensey*, and their agents and attorneys, be, and they are hereby perpetually enjoined, from instituting any proceeding against said sheriff, for releasing said property.

The defendants, *D. R.*, *L. E.*, *J. M. G.*, *W. S.*, *W. P.*, *D. G. Y.*, and *J. W.*, appealed to this court.

The cause was argued before ARCHER, DORSEY, CHAMBERS, SPENCE, STONE and SEMMES, J.

By *W. SCHLEY* and *WEISEL* for the appellants, and
By *ROMAN* and *McMAHON* for the appellees.

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SPENCE, J., delivered the opinion of this court.

All objections to this bill, by the agreement of the solicitors engaged in the argument, having been waived, we shall proceed to the consideration of the points submitted in the argument for the decision of this court.

The controlling question in this case is presented by the *first* point, namely, the legality and effect of the course pursued by *Elizabeth Mason*, administratrix of *John T. Mason*, and that of *Abraham Barnes* and *Melchior B. Mason*, administrators of *Elizabeth Mason*, in the settlement of the estates of their respective intestates, before the Orphans court of *Washington* county.

On the part of the appellee, it is insisted, that the distributions made in the Orphans court in both of these estates, is legal and binding, so far as all the distributees are concerned; and on the other side, it is insisted by the appellants solicitors, that these distributions are illegal and void.

First, as to the administration and settlement of *John T. Mason's* estate, by his administratrix, *Elizabeth Mason*.

This estate appears to have been closed, final account passed, and distribution made in the Orphans court, on the 25th of August 1827, and each distributee's share thereof made out in dollars and cents.

The record discloses the fact, that *Elizabeth Mason*, the administratrix, was, by the orphans court, appointed guardian to the distributees, who were minors at the time. Her accounts passed by the orphans court, as guardian, show that she charged herself, as guardian, with the sum allotted in the distribution to each one of her wards, and annually thereafter, with the interest on the sum thus charged. It appears, also, from the record, that *John Dutton*, who, after the death of *Mrs. Mason*, was appointed guardian to such of the children and distributees of *John T. Mason*, as were then minors, adopted all her acts, and received from the estate of *Mrs. Mason*, the sum thus allowed them in the distribution. There is no fraud alleged in the settlement and distribution of the estate of *J. T. Mason*. There is no allegation of outstanding unpaid

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debts against the administratrix, *qua* administratrix. Her final account was passed, and distribution made in the Orphans court on the 25th day of August 1825. Letters of administration *de bonis non* on the estate of *John T. Mason*, were granted to *John Winter*, on the 12th day of November 1841.

This statement of facts in the record shews conclusively, that, from the settlement of her administration account, and distribution of her intestate's estate in the Orphans court, more than sixteen years had elapsed, before letters of administration, *de bonis non*, on *John T. Mason's* estate, were granted to *John Winter*; and, after all the distributees who were of age, and those who were minors by their guardians, had received their distributive shares.

Letters of administration on the estate of *Mrs. Mason*, were granted by the Orphans Court of *Washington* county, to *Abraham Barnes* and *Melchior B. Mason*, shortly after her death, which occurred in July, 1836.

Mrs. Mason's administrators, returned an inventory of her personal estate, and included all the slaves involved in this controversy, except *John Robinson*, being the slaves which were returned by *Mrs. Mason*, as administratrix of *John T. Mason*; with the exception of those, born subsequently to the date of her inventory. The administrators on the estate of *Mrs. Mason* paid off her creditors, and passed a final account in the Orphans Court: that court made a distribution of the surplus of the estate, and appointed two persons to value and distribute the slaves among the legal representatives of *Elizabeth Mason*, deceased; who accordingly did make distribution; and returned a statement thereof to the Orphans Court. The record does not allege any demand of any outstanding, unpaid creditor, of either of the intestates, *John T. Mason*, or *Elizabeth Mason*, against their administrators *de bonis non, qua*, administrators. The record discloses the fact, that the distributees of *John T. Mason* and *Elizabeth Mason*, (excepting the widow of *J. T. Mason*,) are the same persons; that each of those distributees have received their portion, (those of full age themselves, the minors, by their guardians,) of their estate.

We are called upon, under this state of facts, to say, whether the court below decided correctly, that these distributions, thus made, under the sanction of the Orphans Court of *Washington* county, are null and void? We think not. It might readily be presumed, from the lapse of time, the receipt by all, and disposition of the estate by some, of the distributees; the acquiescence of the distributees, in the one case, of more than sixteen years, and in the other more than four years; no creditor of the intestates making demand of payment; and no charge of fraud; that distribution had been made, even if it did not appear from the record. Vide. *Allender, adm'r of Wyse vs. Riston*, 3 Gill & John. 86.

We are of the opinion, from all the facts which the record in this case reveals, that the distribution made in the Orphans Court of *John T. Mason's* estate, by his administrators, was so made with the knowledge, consent, and full approbation of all the parties, legally interested therein. The administratrix was the mother, the natural guardian, and guardian in fact, of all of the distributees. After the death of *Mrs. Mason*, *Mr. Dutton*, who succeeded her in the guardianship of these, her wards, manifestly approved this distribution thus made, by adopting her acts as guardian; and receiving from her administrators the sums apportioned to each of her wards.

Our conclusion, drawn from these facts, is placed beyond a doubt by the lapse of time when this distribution was made, before any attempt is made to question its integrity. This transaction slept for more than sixteen years, in as profound silence as its author; and, when an effort is made, to drag it up from its long repose, it is not by any charge of deceit, or unfairness, or fraud, but that the letter of the law had not been fully observed, performed, and kept.

Again, this effort is not being now made by the demand of any unpaid, inexorable, creditor of *J. T. Mason*; we hear of no such demand. If, then, it be at the instance of the distributees, through the instrumentality of the administrator *de bonis non*, they come with ill grace, too late, and not in the proper form. If the guardian had acted unfaithfully, or un-

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fairly, in the discharge of her trust, their redress was clear and ample at law, on her bond. It is too late, after such a train of facts and circumstances as this record developes, in which they have participated, and to which, by their sanction, they have given validity, to call them into question now.

The distributees have not only received their distributive portion of the estate of *J. T. Mason*, but they have received the whole of the estate of his administratrix, their mother; whose estate consisted, almost entirely, of what she derived from her intestate, dead husband.

But, to place this question in a still stronger point of view, let us inquire what would be the effect of setting aside those proceedings in the Orphans Court? There is no offer on the part of those who have received this estate, to account for it; and in fact the record shows, that some of them have placed a large part of this estate beyond their control, even if they were willing to do so; and, they, who seek equity, must first do equity.

There is less doubt, or difficulty, as to the settlement and distribution of *Mrs. E. Mason's* estate; and we think its legality beyond question. But, if we did doubt the legality of this distribution in this estate, we do not see how this proceeding could affect it.

That the question in relation to the plate, and horses, and carriage, could not be affected by the distribution of the estates of *Mr. and Mrs. Mason*, we think too clear to require an argument. These articles not having belonged to either of these intestates estates, at the time of their death, from any thing which appears on the record.

The plate, was a legacy, by the will of *Richard Barnes* to *J. T. Mason*, for his life; after which, it was bequeathed to *A. Barnes*. Vide. 3 *Gill & John.*, 86.

Mrs. Mason appears to have acquired the slave, *John Robinson*, after the death of her husband; and he can, by no possibility be subject to the execution in the hands of the sheriff, in this case. As *John Robinson* must necessarily be the property of the grantees, in the deeds from *Abraham*

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Barnes and others to *Gordon and Schley*, and the deed to *Price* and others ; or, otherwise, the property of the administrator, *de bonis non*, of *Elizabeth Mason*. But, it is the opinion of this court, that the property passed by the deeds, from *Abraham Barnes* and others, to the grantees therein named.

The injunction, issued in the case, must, therefore, be dissolved, as to the said plate, carriage, and horses ; and, as to all the other property levied upon, by said *Keller*, except the negroes or slaves : and must be made perpetual, as to all the negroes or slaves levied upon by him.

DECREE REVERSED IN PART.

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December, 1844.

The Legislature have no power in any given determination of the Court of Appeals, to declare what would be the rights of the parties. That is a judicial power which the Legislature does not possess.

Where the Court of Chancery, in 1838, directed certain parties to a cause, to pay their proportion of certain annuities, and the persons supposed to be aggrieved had lost their right of appeal by lapse of time, and in 1843 obtained an act, by which this Court was authorised and required to take cognizance of, and hear and determine the said cause “in manner and to every effect as if such transcript had been in due time transmitted.” HELD, that this court was bound to presume, that in compliance with the order of 1838, the appellees’ proportion of the annuity had been paid, and this court could not determine the case in manner, and to every effect, as if the appeal had been taken in due time.

A legislative act authorising an appeal must either be capable of being complied with by the court, and the terms of the grant followed, or the act must be unconstitutional.

The legislature may pass laws conferring on this court the right to hear appeals in special cases, after the time allowed by the general law had passed by ; but such a law, to have efficacy, must leave this court untrammelled, as to the mode or manner of administering justice.

APPEAL from the Court of Chancery.

(See this case reported in 12 *Gill & John*. 285. December 1841.)

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At this court, the appellees moved to dismiss the appeal, which had been brought up under the act of 1843, chap. 343, viz :

“An act for the relief of Jonathan Prout and others.

WHEREAS, *Jonathan Prout*, and *Ann*, his wife, *Thomas T. Gantt*, *Benjamin S. Gantt* and *Levi Gantt*, have represented to the General Assembly, that they heretofore entered an appeal to the Court of Appeals, against *Zachariah Berry, jun’r.* and wife, in a case in chancery between *Sarah S. Garrett*, *William O. Sprigg* and others, complainants, and *Christopher L. Gantt* and *Benjamin L. Gantt* and others, defendants, and that the transcript of the proceedings was not transmitted to the Court of Appeals, by the late register in Chancery, within the time limited by law, by reason whereof the said cause was excluded from a hearing before the said court :—Therefore,

Be it enacted by the General Assembly of Maryland, That the register of the Court of Chancery be, and he is hereby authorized and directed, to make out and transmit to the Court of Appeals a transcript of the proceedings in the said cause, and the said court are hereby authorized and required to take cognizance of and hear and determine the cause, in manner, and to every effect, as if such transcript had been in due time transmitted on the said appeal to the Court of Appeals, according to the acts of Assembly, in such cases made and provided ; *provided*, said transcript be transmitted within sixty days from the day of the passage of this act, and the said cause shall stand for hearing at the June term, eighteen hundred and forty-four, of said Court of Appeals.”

The motion was argued before ARCHER, DORSEY, CHAMBERS, SPENCE, STONE and SEMMES, J.

By PRATT and ALEXANDER for the motion, and
By TUCK and RANDALL, contra.

ARCHER, J., delivered the opinion of this court.

It appears by the recital to the act of assembly of 1842, *ch.* 168, that this case was originally dismissed by this court, be-

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cause the late register in chancery had omitted to transmit a transcript of the proceedings to this court, within the time prescribed by law, and without any neglect on the part of the appellants. By that law, the case was directed to be reinstated, and brought up by regular continuances, and to be heard at *June* term, 1843.

The case was again dismissed by this court, because it was of opinion, that the legislature possessed no power in any given determination of the Court of Appeals, to declare what would be the rights of the parties: for however consistent with justice and equity such a declaration may have been, the legislature could exercise no judicial power.

The case is brought up again, under the *act of 1843, ch. 343*, and a motion has, again, been made to dismiss the appeal. The ground of the application is, that the court “are authorised and required to take cognizance of, and to hear and determine the cause in manner, and to every effect, as if such transcript had been in due time transmitted, on the said appeal, to the Court of Appeals, according to the acts of Assembly, in such case made and provided;” and, it is insisted, that this mandate of the law cannot be obeyed by this court, without the most flagrant injustice. That the result of a hearing and decision of this case, to *every effect* as if the record had been transmitted in time might, and we are bound to suppose would, have the effect of divesting vested rights.

The order of the chancellor directs the devisees, among others, the appellees, to pay their proportion of certain annuities left by the testator, *Levi L. Gant*. This order was passed by the chancellor, on the 3rd of November 1838. The court are bound to presume, that in compliance with this order the appellees proportion of such annuities has been regularly paid. What then would be the effect of a reversal of the chancellor’s decree, in pursuance of the terms of the act? This court are to determine the case, in manner, and to every effect, as if the appeal had been taken within the time prescribed by law.

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If it be the duty of the court under this act, and we think it would be if the act is to govern, to determine this case to every effect as if the appeal had been in due time, we could in no manner notice any payments made by the appellee in pursuance of the chancellor's order, and the appellees must sustain a loss co-extensive with payments by them made. A law, attended with such consequences, could not be constitutionally passed by the legislature.

Whatever might be said, were the question a new one as to the power on the part of the legislature to confer on this court the right to hear appeals in special cases, after the time allowed by the general law for an appeal had passed by, it is now too late to question it. But such a law, to have efficacy, must leave us untrammelled as to the mode or manner of administering justice.

A special law has been referred to, with similar phraseology with the one now under consideration, under which this court acted. There was not however, there, as here, any thing in the character of the proceedings, which either indicated, that by entertaining the appeal the rights of any would be injuriously affected; nor, in fact, were such rights in any manner thereby affected.

APPEAL DISMISSED.

FREDERICK BYER vs. S. ETNYRE AND C. H. S. BESORE.—
December, 1844.

There is no precise form of return prescribed by law, for returns of levies made by constables to writs of *feri facias*. The term *levied* in such returns imports a seizure, by common usage.

Seizure under an execution is a matter in *pais*, which may be proved by *parol* evidence.

It is not the constable's return which gives title to a purchaser under a *feri facias*, but the seizure and sale under the writ. The return is evidence, but not the only admissible proof of those facts.

A statement of the seizure and sale in the receipt for the purchase money given to the vendee, would be as effectual to transfer the title to the *per-*

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sonal property described in it, as the most formal return, endorsed on, or attached to the writ.

The seizure, sale, and payment of the purchase money, may also be established by oral testimony, and be equally valid for the purchaser as a return.

The act of 1729, ch. 8, sec. 5, requires that a deed for personal property, when the grantor remains in possession, shall be acknowledged before one justice of the county, where the grantor resides. Where the acknowledgment omitted to state the official character of the officer before whom it was made, it may be proved by the admissions of the parties.

That act prescribes no form of acknowledgment; it does not require the authority of the justice to take it, to appear on the face of his certificate, nor is it necessary to state that the justice was a resident of the county where he acted.

Where the justice, taking the acknowledgment of a deed under the act of 1729, ch. 8, sec. 5, does *not reside* in the county where it was taken, the instrument is as inoperative, as if the person taking the acknowledgment were not a justice.

If an acknowledgment contrary to the fact, state the residence of the party to be in a different county from that of the justice, the error may be proved, and the instrument established under the act of 1729.

A false statement in the certificate of the justice may be disproved, and an instrument thus invalidated.

The case of *Conelly vs. Bowie*, 6 *Harr. and John*. 141 cited and explained.

Under the act of 1729, ch. 8, sec. 5, the recording of a bill of sale of personal property within *twenty days*, in the records of the same county is as necessary to its validity, as is, its acknowledgment.

Where the bill of exceptions contain no evidence of such recording, the usual certificate thereof by the county clerk not appearing by the record to have been indorsed on the bill of sale, it is not admissible in evidence in an action at law between the creditors of the grantor, and a defendant claiming to rely on the grantor's title.

The statement "at the request of *Z.*," (the grantor) "the following bill of sale was recorded" preceding a bill of sale in a bill of exceptions, where the admissibility of the deed as evidence was objected to, not signed by any person, is no proof of the recording of such instrument.

M. and *L.* rented a farm from *Z.*, and agreed to give him one half of all the grain raised on it as a rent for the same, and on the 8th May 1841, they executed a bill of sale to him for a variety of chattels, and also for all their "portion of grain now growing on his, the said *Z.*'s farm, and all that should be sown or planted, each succeeding year." This instrument was not proved to have been recorded under the act of 1729; and contained a warranty of title by the grantors, and a declaration of a delivery of part of the goods, &c., for the whole. In the fall of 1841, *M.* and *L.* sowed a crop of wheat; and on the 23rd February 1842, agreed with *Z.* that he should offer the grain in the ground for sale for his own use, and credit them

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with its proceeds. No sale having in fact been made, *E.* and *B.*, judgment creditors of *M.* and *L.*, who were still in the occupancy of the land, on the 26th February 1842, levied a *fiery facias* on the growing grain as the property of *M.* and *L.*; and sold the same on the 9th March, under the writ. The purchaser agreed with *E.* and *B.* that his liability should depend on the question whether the crop belonged, of right, to *M.* and *L.* It appeared *B.* had a knowledge of the bill of sale of May 1841, but not until after the grantors thereof became indebted to *E.* and *B.*, though before they issued their writ of *fi. fa.* In an action by *E.* and *B.*, against the purchaser of the grain, to recover the price thereof, the *County court* refused to instruct the jury upon the prayer of the defendant, that the bill of sale though invalid as a grant, yet, as a covenant between the parties, was effectual, and would entitle *Z.* to hold the grain, if the jury should believe that he had paid the consideration mentioned therein, and the plaintiffs had notice of its existence anterior to issuing their writs, and *Z.* had permission before their issue to sell the grain for his own use. Upon appeal by the defendant, the exception to such refusal was abandoned:

Where permission was given by a tenant to his landlord to sell grain growing in the ground, for his own use, on the premises, and in view of the grain, and the landlord proceeded to advertise such grain for sale, whether such facts amounted to a delivery of the grain, is a question dependent upon the intention of the parties, to be passed on by the jury.

When, before a court can grant a prayer it must assume the non-existence of all the testimony not enumerated in it, and thus exclude material evidence from the consideration of the jury, or assume facts of which no proof had been offered, to grant it would be to transcend its jurisdiction, and exert a power which belonged exclusively to the jury, or which could not be exercised in the particular case, either by the court, or jury.

APPEAL from *Washington County Court*.

This was an action of *assumpsit*, commenced on the 12th October 1842, by the appellees, partners, trading under the firm of *Etnyre and Besore*, against the appellant. The plaintiff's declared that the defendant, being indebted to them, in the sum of, &c., for a certain crop of wheat, in the ground, of the plaintiff's, before that time bargained and sold, by the plaintiff to the defendants; for matters properly chargeable in account; and for an account stated between the parties.

The account filed with the declaration, was as follows:

“*Frederick Byer* bought of *Etnyre and Besore*,—1842, March 9. To 55 acres of wheat, in the ground, at constable's sale, a \$4.40, \$242.—Interest from 9th March 1842.”

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The defendants pleaded *non assumpsit*, on which issue was joined.

1ST EXCEPTION. At the trial of this cause, it was admitted, that the sum of money for which the suit is brought, was for the purchase, at constable's sale, of certain grain, which was raised by *James P. Mayhue* and *George Lowman*, on a farm which they had rented, and held as tenants of *Frederick Ziegler*. That by the terms of the said writing, the said *Mayhue* and *Lowman*, were to give one half of all the grain raised on the farm, as rent for the same. That the sum of money, for which this suit is brought, was for the purchase money of the tenants' share of the crop, sown in the fall of 1841, and reaped in the summer of 1842, and that at the time of the said purchase, by the defendant, it was understood and agreed between the plaintiffs and the defendant, that the liability of the defendant for the said purchase money, should depend upon the question, whether the said tenants' share of the said crop belonged, of right, to the said *Mayhue* and *Lowman*, at the time of the said sale, so far as the rights of the plaintiffs, as creditors of said *Mayhue* and *Lowman*, as hereinafter set forth, were to attach or not on the same, or to the said *Frederick Ziegler*.

The plaintiffs then, to support the issue on their part joined, offered in evidence to the jury the following judgments, viz:

Etnyre and Besore vs. George Lowman, 22nd February 1842.

Same vs. J. P. Mayhue and George Lowman, 25th February 1842.

Same against same, 25th February 1842.

And a *fi. fa.* issue, 25th February 1842, on the judgment against *George Lowman*, endorsed:

“Levied on the interest of *fifty-six* acres of grain, in the ground, as the property of *J. P. M.* and *G. L.*, to satisfy the within claim; also, one stack of hay. *A. G. Snyder*, constable. February 26th, 1842. Settled in full by sale, March 9th 1842.”

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Writs of *fi. fu.* were issued and similarly returned on the two other judgments. And then proved, by *Abraham G. Snyder*, the constable, that in virtue of said *fi. fas.*, which were placed in his hands by the plaintiffs, he seized the grain growing on the said farm, so rented, to which said *Mayhue* and *Lowman* were entitled under their said lease from *Ziegler*, as aforesaid, and sold the same to the defendant, who became the purchaser, under the understanding and agreement aforesaid; and which said *fi. fas.* were delivered to the officer to whom directed, on the evening of the day on which they were issued and bear date, a little before sundown. To the admissibility of which said writs and endorsements the defendant, by his counsel, objected, for the following reasons:

1. That the endorsements on the said writs do not sufficiently show a levy upon, or seizure of the grain in question.

2. That the said endorsements do not sufficiently show a sale of the said grain, and that they do not show the return of the officer, of what was done under the said writs. But the court (*BUCHANAN, A. J.*,) overruled the said objections, and permitted the evidence to go to the jury. To which opinion of the court, overruling the said objections, the defendant excepted.

2ND EXCEPTION. The defendant, then, after the admissions and testimony detailed in the first bill of exceptions, and which he prays may be taken and considered in this, his second bill of exceptions, to support the issue on his part joined, offered in evidence the following instrument of writing:

“At the request of *Frederick Ziegler*, the following bill of sale was recorded, May 24th, 1841.

Know all men by these presents, that we, *James P. Mayhue* and *George Lowman*, of *Washington* county, in the state of *Maryland*, for and in consideration of the sum of *fourteen hundred and thirty-seven dollars and fifty cents*, current money, to us in hand paid by *Frederick Zeigler* of *Washington* county, in the said state, at and before the sealing and delivering of these presents, the receipt whereof, we, the said *J. P. M.* and *G. L.*, do hereby acknowledge, have granted, bar-

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gained and sold, and by these presents do grant, &c., unto the said *F. Z.*, his, &c., all the goods, household stuff, implements and furniture, particularly mentioned, expressed and contained in the schedule, hereinafter particularly mentioned, that is to say: one gray horse, &c., and also, all our portion of grain now growing on his, the said *Z*'s farm; also, all that shall be sowed or planted each succeeding year. To have and to hold, all and singular, the said, &c., the premises above bargained and sold, or mentioned and intended so to be, to the said *F. Z.*, his, &c. And we, the said *J. P. M.* and *G. L.*, for ourselves, &c., all and singular, the said goods, &c., unto the said *F. Z.*, his &c., against us, the said *J. P. M.*, *G. L.*, our, &c., and against all and every other person or persons, whatsoever, shall and will warrant and forever defend by these presents, of all and singular, which said goods, &c. we, the said *J. P. M.* and *G. L.*, have put the said *F. Z.*, in full possession, by delivering to him, the said *F. Z.*, one table spoon, at the sealing and delivering of these presents, in the name of the whole premises, hereby bargained and sold, or mentioned and intended to be so, unto him, the said *F. Z.*, as aforesaid. In witness whereof, we have hereunto set our hands and affixed our seals, the 8th day of May, 1841.

JAMES P. MAYHUE, (Seal.)

GEORGE LOWMAN, (SEAL.)

State of *Maryland*, *Washington* county, to wit: on this 8th day of May 1841, personally appears *James P. Mayhue* and *George Lowman*, and acknowledge the foregoing instrument of writing to be their act and deed, according to the act of Assembly in such case made and provided. Acknowledged before *Wm. Webb*."

And also offered to prove, from the records of *Washington* county, that *Wm. Webb*, before whom said instrument of writing was acknowledged, was, at the time thereof, a justice of the peace of the state of *Maryland*, in and for said county, duly commissioned and qualified, (but this being admitted by the plaintiffs, the proof thereof as offered was waived,) to the reading of which instrument of writing to the jury, the plain-

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tiffs objected, upon the ground that the said *William Webb* does not upon the face of the said acknowledgment, make any mention of his official character, or state himself to be a justice of the peace ; which objection the court, (T. BUCHANAN, A. J.,) sustained, upon the ground aforesaid, and refused to permit the said instrument of writing to be read to the jury ; to which opinion and refusal of the court, the defendant excepted.

3RD EXCEPTION. The defendant then, in addition to the facts mentioned in the first and second bill of exceptions, which he prays may be considered as incorporated in this, his third bill of exceptions, offered in evidence to the jury by *James P. Mayhue*, one of the persons who had rented the farm from the said *F. Z.*, as aforesaid, and also one of the defendants in the said writs of *feri facias*, that on or about the 23rd of February 1842, it was agreed between himself and the said *F. Z.*, that the said *Z.* should offer the grain in the ground, the proceeds of which is the subject matter of this suit, together with the other personal property, in said instrument of writing mentioned for sale, for his own use ; and that the proceeds of the said sale should be applied to the payment of the debt due the said *Ziegler*, and for the security of which the said bill of sale was executed. The debt so due to the said *Ziegler*, was then about eleven hundred dollars. That at the time of its being so agreed, that the said *Z.* should sell the grain and personal property, it was also understood, that if the said grain did not bring a fair price, of which said *M.* and *L.* were to be the judges and determine, that then the said *Z.* should proceed to cut the said grain ; and after paying himself out of the said grain for the cutting and securing the same, he should give the said *M.* and *L.* credit for the residue on the said debt. That the said *M.* made the arrangement with the said *Z.*, to save trouble. That considering the said instrument good and valid, as vesting a title in the said *Z.* to the said grain, he agreed to let him sell the said grain in his own name, as it would be better and save the trouble of selling it themselves, and then assigning the notes to the

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said Z. That the said Z., the next day after said agreement, or perhaps the day following that, did advertise the said grain and personal property for sale. That the printed hand bill, here shown by the witness, is one of the advertisements printed, and put up at public places in the neighborhood, in relation to the said sale. The said advertisement here follows, to wit : &c.

The said M. further proved, that he was in possession of said farm on which said grain was then growing, under the said lease from said Z., at the time he made said arrangement for said Z. to sell said grain as aforesaid, and continued in possession of the same up to the 1st of April 1842, when his lease expired. The said Z. was occupying a house on said farm at the time, and which he had occupied from the commencement of said lease. The defendant further proved by the said J. P. M., that before the said F. Z. offered the said grain and personal property for sale, as aforesaid, in a conversation which he had with the said *Charles H. S. Besore*, one of the plaintiffs, the said *Besore* mentioned that he had a knowledge of the said bill of sale or instrument of writing, so executed by the said M. and L., to the said F. Z. But that he had no such knowledge, until after the indebtedness of said *Mayhue* and *Lowman* to said *Besore* had taken place, though before he issued the said *fi. fas.* That the said *Ziegler* in pursuance of said notice by hand bill, sold said personal property, except said grain ; that the sale thereof amounted to four hundred dollars and upwards.

The defendant thereupon prayed the court to direct the jury, that the said instrument of writing though it may not be valid as a grant, yet that as a covenant between the parties, it is good and effectual, and will entitle the said *Frederick Zeigler* to hold the said grain under such contract, if the jury believe from the evidence, that the said *Zeigler* had paid the consideration mentioned in the said contract, and especially, if the plaintiffs had notice of the existence of such contract, anterior to the issuing of their said writs of *fieri facias*, &c. ; that the said *Ziegler* had permission, before the issuing of said

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writs, from the said *Mayhue* and *Lowman*, to sell the same for his own use ; which opinion and direction the court refused to give. To which refusal of the court, the defendant excepted.

4TH EXCEPTION. The defendant, upon the same facts stated in the former bills of exceptions, prayed the court to direct the jury, if they believe from the evidence that the said *Frederick Ziegler* had permission and authority from the said *Mayhue* and *Lowman*, before the delivery of the said writs of *feri facias* to the constable, to proceed and sell said grain in the ground for his own use, and that this permission and authority were given on the premises, and in view of the said grain in the ground; and that said *Ziegler* did, thereupon, proceed to advertise the said grain for sale, before said writs of *feri facias* were so delivered, that the said facts amounted to a delivery of said grain to the said *Ziegler*, and the plaintiffs are not entitled to recover ; which opinion and direction the court refused to give. To which refusal of the court the defendant excepted.

The verdict and judgment being against the defendant, he prosecuted the present appeal.

The cause was argued before ARCHER, DORSEY, CHAMBERS, SPENCE, STONE and SEMMES, J.

By WEISEL and PRICE for the appellant, and

By MASON and F. A. SCHLEY for the appellees.

DORSEY, J., delivered the opinion of this court.

The County court, we think, committed no error in overruling the appellant's objections to the admissibility of the writs of *feri facias*, and the endorsements thereon. The first of which is, "that the endorsements on the said writs do not sufficiently shew a levy upon, or seizure of the grain in question." There is no precise form of return to such executions prescribed by law ; and that made by the constable on this occasion, as far as this objection is concerned, is in accordance with the returns usually made by such officers ; and by common usage and acceptance, the term "levied" when thus

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used by constables, imports a seizure. But suppose the facts were otherwise; seizure is a matter in *pais*, which may be proved by *parol* evidence, and was so proved by the constable who made the same, prior to any objection being taken to the testimony. It is not the constable's return which gives title to a purchaser under a *feri facias*; but the seizure and sale under the writ. And the constable's return is evidence, but not the only admissible evidence of those facts; a statement thereof, in the receipt for the purchase money given to the vendee, would be as effectual to transfer the title to personal property, as the most formal return indorsed on, or attached to the writ; and if there had been no return made, nor receipt given by the constable, and the seizure, sale, and payment of the purchase money were established by oral testimony only, the title of the purchaser would be equally good.

The remarks made upon the first objection are, for the most part, equally applicable to the second. The *parol* evidence of the constable obviating the defects, imputed to the returns made to the writs of *feri facias*.

The only question raised on the second bill of exceptions in the court below, and on which the court decided was, whether a bill of sale, under the act of 1729, chap. 8, which enacts, "that from and after the end of this session of Assembly, no goods or chattels, whereof the vendor, mortgagor or donor shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, mortgagee, or donee, unless the same be by writing, and acknowledged before one provincial justice, or one justice of the county where such seller, mortgagor, or donor shall reside, and be within twenty days recorded in the records of the same county," was admissible in evidence, where the magistrate, who took the acknowledgment, omitted to state therein the official character in which he acted; and where it was admitted by the parties in the cause, that the person before whom the acknowledgment was made, was at the time thereof, a justice of the peace of the State of *Maryland*, in and for *Washington* county, duly commissioned and qualified as such.

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The only ground assigned for the rejection of the testimony offered, was, that the person who took the acknowledgment did not, upon its face, make any mention of his official character, or state himself to be a justice of the peace. Which objection to the evidence offered, the bill of exceptions states, that "the court sustained, upon the ground aforesaid, and refused to permit the said instrument of writing to be read to the jury." The act of 1729, prescribes no form of acknowledgment to be taken by the justice; much less does it require that the authority of the justice to take the acknowledgment, should appear upon its face. With equal, if not greater propriety, might it be insisted, that where the acknowledgment is made before a justice of the county, it should state, that the person was a resident thereof, who made the acknowledgment. Without such residence, the writing acknowledged is as inoperative and void, as if the person taking the acknowledgment were not a justice of the county. And yet, perhaps, not an instrument of the kind can be found, where the acknowledgment contains any such assertion of residence. And should the acknowledgment, contrary to the fact, state the residence of the party to be in a different county from that of the justice, the erroneous statement might be disproved, and the instrument acknowledged, established in its operation under the act of 1729: although upon the face of the acknowledgment it appeared to be a nullity. See the case of *Gittings vs. Hall*, 1 *Harr. & John.*, 18; and so, if the acknowledgment had stated the person taking it to be a justice of the county, when, in truth, he was not so, the falsehood might be proved, and the instrument invalidated. And, *a fortiori*, may the defect be supplied, by testimony *aliunde*, where the acknowledgment omits to state the official character of him, by whom it was taken. And the proof offered, even if not admitted to be true, as was the case on this occasion, was much stronger and more conclusive evidence of the fact of official authority, than would have been the mere statement thereof, in the body of the acknowledgment. This view of the case we think fully sustained by the opinion of this court

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in *Connelly vs. Bowie*, 6 Harr. & John. 141, where, in an action of ejectment, a certified copy of a deed was admitted as evidence, by the county court, although the acknowledgment thereto, neither stated the official character of the persons taking it nor the county in which it was taken. This court, in reviewing the judgment of the county court, say: "The official character of the persons before whom the supposed acknowledgment was taken, does not appear on the face of it, and the paper is equally silent as to the county in which the acknowledgment was taken; *nor is there any proof in the record showing, that John Ball and Turner Wootton were justices of the peace; or that the acknowledgment was made in the county, in which the lands were then situate;*" and for these reasons reverse the judgment of the county court. Is not the inference irresistible, that had there been proof in the record, *dehors* the certified copy produced, shewing that *John Ball and Turner Wootton*, (the persons before whom the acknowledgments were taken,) were justices of the peace of, and that the acknowledgment was made in, the county in which the lands were situate, the judgment of the county court would not have been reversed, for the defects appearing on the face of the deed; the copy whereof had been admitted by the county court, in evidence to the jury?

But, although the county court, in the case before us erred, in refusing to permit for the reason assigned, the instrument of writing to be read to the jury, as offered by the appellant, yet its refusal was justified upon a ground which does not appear to have been brought to its notice, but which this court are not at liberty to overlook. By the act of 1729, chapter 8, under the provisions of which the bill of sale before us was taken; its being recorded within twenty days "in the records of the same county," is as necessary to its validity, as is its acknowledgment. The record contains no evidence of such recording: the usual certificate thereof, by the county clerk, not appearing by the record to have been indorsed on the bill of sale. It is true, that preceding the bill of sale there is the following written statement, viz: "At the request

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of *Frederick Zeigler* the following bill of sale was recorded, May 24th, 1841." But this statement is signed by nobody; and where or by whom recorded, *non apparet*.

The third bill of exceptions having been abandoned, this court are relieved from its consideration.

We concur with the county court, in its rejection of the appellant's prayer, in the fourth bill of exceptions, that if the jury "believe from the evidence, that the said *Frederick Zeigler* had permission and authority from the said *Mayhue* and *Lowman*, before the delivery of the said writs of *fieri facias*, to the constable, to proceed and sell said grain in the ground, for his own use, and that the permission and authority were given on the premises, and in view of the said grain in the ground; and that the said *Zeigler*, did thereupon, proceed to advertise the said grain for sale, before said writs of *fieri facias* were so delivered, that the said facts amounted to a delivery of the said grain to the said *Zeigler*, and the plaintiffs are not entitled to recover." Before the court could grant the prayer thus made to it, it must assume the non-existence of all the other oral testimony given in the cause; because, by the prayer, no part of it is submitted to the finding of the jury. In the absence of all proof, that any consideration was paid for the said permission and authority: or, that it was delegated by *Mayhue* and *Lowman* to *Zeigler*, on account of any debt due from the former to the latter; or for what purpose this delegation of power was made; to call on the court below to deduce the fact of the delivery of the grain to *Zeigler*, from the facts submitted by the prayer to the finding of the jury, was to ask the court to transcend its jurisdiction, and exert a power exclusively within the cognizance of the jury. The authority delegated, and its incipient exercise by *Zeigler*, are perfectly consistent, either with the delivery, or non-delivery of the grain. Delivery, in this case, was a fact dependent upon the intention of the parties, to be passed on by the jury, upon evidence being offered, which was legally sufficient for them to assume

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its existence. And so far from the court granting the appellant's prayer, upon the finding by the jury of the facts enumerated, with equal if not greater propriety might the appellees have prayed an instruction from the court to the jury, that from their finding, only, the facts submitted to them in the appellant's prayer, they were not warranted in finding the delivery of the grain to *Zeigler*.

Concurring in opinion with the county court, in its admission of the testimony stated in the first bill of exceptions; and in its refusal to grant the appellant's prayers in the second and fourth bills of exceptions, we affirm its judgment.

JUDGMENT REVERSED.

PETER BELL, ET AL., vs. WILLIAM WEBB AND PETER MONG.—*December, 1844.*

On the 1st February 1820, *B.* being in debt on judgment, executed a mortgage of his lands to *C.*, to secure him a sum due on bond. On the 29th of the same month, he executed a *second* mortgage of his lands and personal property to *W.* and *M.*, who were his sureties; and for their indemnity. On the 27th July following he executed a *deed of trust* for the property mentioned in the second mortgage, to the same grantees. The trust was to sell the property, as speedily as it could be done without a sacrifice, and pay 1st, all liens and incumbrances according to their priority; and 2nd, all judgments obtained against, debts or liabilities undertaken by, *W.* and *M.* for the said *B.* The personal property, which was under execution, was sold and so applied. The land was not sold until October 1821.

HELD :

- 1st. That as the trustees were not obliged to sell at a sacrifice, by the terms of the deed, the depressed price of lands furnished a sufficient justification to them for forbearing the sale for the time they did forbear.
- 2nd. That at the sale of the land, which was by virtue of an execution, the purchaser was, in fact, an agent of one of the trustees.
- 3rd. A trustee who purchases the trust property, which had been previously levied on, at the sheriff's sale under the writ, being guilty of no fraudulent conduct to depress the price, will be entitled to re-imbursement of his expenditures, but cannot deprive the *c. q. t.* of the benefit of his purchase.
- 4th. The circumstance of the trustee having an interest coupled with his trust, as for the satisfaction of his own claims, does not dispense with the

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equity, that all his acts should enure in equal proportions to the benefit of others according to the extent of their claims, as well as to himself.

Where a *c. q. t.* attended the sale of trust property, under an execution, by a judgment creditor of the grantor of the fund, was requested to bid and did not; nor did he express any dissatisfaction therewith, but it did not appear that, he then, or at any subsequent time until the filing of his bill, had any notice or knowledge, that his trustee, through an agent, was the purchaser, there is no ground to impute acquiescence in the sale, though eighteen years had elapsed.

In such a case, the sale is voidable at the election of the *c. q. t.* The land remaining in the possession of the trustee, at the institution of the suit, may be sold, and the purchase money, after allowing the trustee all the money by him paid and applied to the purposes of the trust, and also for all necessary and proper expenditures upon the land, and permanent improvements thereon, over and above its profits, shall be applied to the purposes of the trust.

APPEAL from the Equity side of *Washington County Court.*

The bill, in this cause, was filed on the 13th October 1839, by *Peter, Daniel, and Frederick Bell*, of, &c., children and administrators of *Frederick Bell*, late of *Washington county*, deceased, and alleged, that on or about the 1st February 1820, *Daniel Berger* being seized in fee of the lands, &c., hereinafter mentioned, proposed to mortgage the same to the said *Frederick Bell*, deceased, to secure a certain claim which the said deceased at that time, had against the said *Daniel Berger*; and the said *Berger* affirmed the said premises to be free from all prior incumbrances; that on said 1st February 1820, the said *Daniel Berger*, executed and delivered to their said deceased father, a deed of mortgage for the said lands and tenements, reciting, among other things, that “whereas the said *Daniel Berger*, by his bond or obligation, bearing even date with these presents, stands bound unto the said *Frederick Bell*, his, &c., in the sum of \$1402.60, with condition thereto written, for the payment of \$701.30, with legal interest from the 1st March next, ensuing the date, &c.” And the said *Daniel Berger*, by said deed, for and in consideration of the said recited debt, as well as, &c., did grant, &c., unto the said mortgagee and to his heirs, &c., a certain part of a tract of land called “*Huckleberry Hall*,” containing, &c.; and a

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certain tract of land, called "*Kysers Inheritance*," containing, &c. And the said deed contained a condition, or proviso, thereto annexed, that if the said *Daniel Berger* should pay the said \$701.30, on or before the first day of March, ensuing the date of said deed, the same should be void, otherwise, to remain in full force and virtue in law; all of which will more fully appear, &c.; that the said sum of \$701.30, was not paid to your orators' deceased father in his lifetime, or any person on his account, nor to your orators, or any person on their account, since his decease, according to the said provisions in the said deed and bond mentioned, whereby the said deed of mortgage became forfeited, &c. But now, so it is, the said *Daniel Berger*, combining and confederating with a certain *Wm. Webb*, and a certain *Peter Mong*, and divers other persons, whose names are hereinafter mentioned, and made parties hereto, and others, &c., to injure and aggrieve your orators' deceased father, in his lifetime, and your orators since his death; and to deprive them of the said sum of money, and the interest thereon, give out and pretend, that the said *Daniel Berger*, in his lifetime, executed a certain other deed of mortgage to the said *William Webb* and *Peter Mong*, of the same property, to secure them in the manner therein set forth and recited; which the said *Webb* and *Mong*, claim as a prior lien, or incumbrance, on the said property, which said deed is dated, the 29th February 1820. And, that the said *Daniel Berger* executed a certain other deed, or conveyance, in trust, of the same property, for the purposes therein mentioned, to the said *William Webb* and *Peter Mong*, which said deed is dated, the 27th July 1820. That the said *William Webb* and *Peter Mong*, under the authority given them by said deed of trust, pretended to convey the said property to *Marmaduke W. Boyd*, by deed, dated the 24th January 1824, for the trifling consideration of one thousand and ten dollars; that all the said conveyances were only part of a scheme and contrivance, to defeat the just claim of your orators' deceased father, who was not familiar with matters of law, and was prevented prosecuting his claim against said property, by the intricate entanglement of the

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same; that the said *Marmaduke W. Boyd*, the nominal grantee in said deed, never took possession of said property, and does not appear ever to have enjoyed any benefit under the said last mentioned deed; but the same was, in fact, a mere contrivance of said *Mong*, or said *Webb* and *Mong*, to protect themselves, or the said *Mong*, in the possession and enjoyment of said property, which he, the said *Mong*, appears to have had, and the proceeds thereof, since 1820, till the present time; and to defeat the claim of your orators' deceased father.

And, the said *Mong*, still confederating with the said *Daniel Berger*, notwithstanding the deed, he, the said *Mong*, had previously, in conjunction with the said *Wm. Webb*, as the trustees aforesaid, pretended to make to *Marmaduke W. Boyd*, and the legal title thereby conveyed to said *Boyd*, (if the said *Webb* and *Mong* could convey the same,) he, the said *Peter Mong*, took another deed of the same property from the said *Daniel Berger*, dated the 13th February 1828; the said *Berger* not having had any reconveyance of said property. All of which will more fully appear, by reference to the said deeds, each and every of which, your orators pray, may be taken as part of this bill. And your orators aver, that, if the said deeds were in fact made *bona fide*, and for good and valuable consideration, of which they charge to be fact, the mortgage of your orators' deceased father has the priority of date, and is, therefore, entitled to be fully satisfied out of the said property. Your orators' further allege, that under the deed of trust of the said *Daniel Berger* to the said *Wm. Webb* and *Peter Mong*, dated 27th July 1820, there was a large and valuable personal property, conveyed to *Wm. Webb* and *Peter Mong*, along with the property herein before mentioned; and, also, another small tract of land, containing one and one-fourth acre; all of which both personal and real property, were conveyed to satisfy the trusts therein mentioned, and to pay off all encumbrances on the property; that, in said deed, were recited certain judgments against, and other liabilities of *Daniel Berger*; but the more effectually to perplex and defeat the claim of your orators' deceased father, it is not mentioned, though created only a few

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months before the date of said deed, that the judgments, which they pretended to make liens on the property, amounted only to about the sum of \$2000, which the personal property would have been sufficient to satisfy, if a faithful account had been rendered of the same; and a fund might have been raised from the sale of the real property, more than sufficient to pay off the mortgage of your orators' deceased father. But your orators charge, that the said judgments had not a prior claim upon said property to the said mortgage, or if they had, they have since been discharged. Yet the said *Wm. Webb* and *Peter Mong*, have neglected to settle any account of the real and personal estate, so conveyed, in trust, and to pay off the incumbrances, according to the directions of the deed, and the trusts conferred upon and assumed by them. And your orators charge, that the said *Peter Mong*, since the deed of *Daniel Berger* to him, dated the 13th February 1828, has taken upon himself the exclusive control and disposition of said property, and has sold parts thereof to divers persons, to wit, &c.; shewing the great value of said property, and the fraudulent and insufficient consideration pretended to have been paid for the whole property, all of which is of equal value, conveyed or pretended to be conveyed under the deed of trust, aforesaid; which will more fully, and at large appear, by reference to said last mentioned deeds; all of which are made parts of this bill. And your orators further shew, that the said *Daniel Berger* died in this county, in or about the year 1833, or 1834, insolvent, and without any personal property to administer upon; that there was no administration, and that, consequently, your orators claim, or any part of it, was never satisfied; that the said *Daniel Berger* left children, to wit, &c.

Prayer, that the said *Wm. Webb*, *Peter Mong*, *Marmaduke W. Boyd*, and other parties, defendants hereto, may set forth and show, what other right, title, interest, or claim, they, or any of them, may have in said property; that the said *Peter Mong*, or the said *Wm. Webb* and *Peter Mong*, and the other parties, holding the said lands according to their proportions, if there be not a sufficient quantity still in the possession of

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said *Peter Mong*, may be decreed to pay and satisfy to your orators the said sum of, &c.; and, in default thereof, that the said parties hereto, and all persons claiming or to claim under them, may be foreclosed of, and from, all equity of redemption, &c.; and the same, or so much as may be required, may be decreed to satisfy the mortgage held by your orators; and, if it be necessary and proper, that the said *Wm. Webb* and *Peter Mong*, may be decreed to settle their trust under the direction of this honorable court, and that the claim of your orators may be decreed thereby to be satisfied; and that your orators may have such other, and further relief, as, &c.; of subpœna, &c.

The defendants, the trustees, appeared and answered the bill. The nature, character and extent of that answer; the exhibits filed by both parties; and the testimony, sufficiently appear in the opinion of this court.

On the 24th December 1842, Washington county court, setting as a court of equity, dismissed the bill with costs, and the complainants prosecuted this appeal.

The cause was argued before ARCHER, DORSEY, CHAMBERS, STONE and SEMMES, J.

By SPENCER for the appellant, and
By PRICE for the appellees.

ARCHER, J., delivered the opinion of this court.

Daniel Berger, being largely indebted on judgments obtained against him in *Washington* county court, executed to the complainant, on the 1st of February 1820, a mortgage on his lands to secure the payment of \$701.30; and on the 29th of February, executed a deed of mortgage to *William Webb* and *Peter Mong*, for his said lands and personal property. In this deed, it is recited, that *Berger* was in debt to sundry persons in the sum of \$6000; and that *Webb* and *Mong* were his securities, and that the deed is executed to secure them the payment thereof; and subsequently, on 27th July 1820, he executed a deed of trust for the said lands and personal property in trust, to sell the same as speedily as it could be done, without a sacrifice,

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for the purpose of paying off, first, all the liens and incumbrances according to their priority. Secondly, for paying off all judgments, and debts, and liabilities, obtained against, or undertaken by the grantees, on account, and for the said *Berger*, &c.

The answer states, that the personal property, which was under execution, sold on 2nd November 1820, for near \$600, and was applied to payment of the executions which covered it. That the trustees offered the lands for sale, and could get no bid for them, owing to the depressed prices of land at that time. That the judgment creditors became impatient, issued executions, and the land was offered at sheriff's sale on 3rd day of July 1821, and was subsequently sold by the sheriff under *vendies*, on the 21st of October 1821, to *Marmaduke W. Boyd* for \$1010. That this sum was insufficient to pay the liens and judgments, prior to the complainants mortgage; that *Boyd* purchased the land, at the request of *Webb* and *Mong*, to aid them in getting out of the difficulties in which they were involved, by being connected with the concerns of *Berger*. That after said purchase, they conveyed to *Boyd* all the interest they had in the land, to enable *Boyd* to sell the lands, that the proceeds might be applied to their relief; but *Boyd* being unable to sell, *Mong* agreed to purchase the land from *Boyd*, and paid him \$1500 for the same, which sum covered all expenditures by *Boyd*, in the purchase, &c., of the land.

By the evidence, it is established, that *Mong* and *Webb* had offered the lands at private sale repeatedly; that lands were depressed in price very much at that time, and that within a year after the deed to them *fi. fas.* on those judgments were issued, and upon *vendies*, they were sold.

As the trustees were not obliged to sell at a sacrifice, by the terms of the trust, the depressed price of lands furnished a sufficient justification to them for forbearing the sale, for the time they did forbear.

There appears to be no evidence satisfactory to us, that there existed any combination between the trustees and the judgment creditors, to bring these lands to a sale.

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We are, therefore, bound to consider, that no imputation can lie against the trustees on account of the executions.

It cannot however, we think, be doubted, that at the sheriff's sale, *Boyd* in the purchase, was the mere agent for *Mong*. This is evident, we think, as well from the facts disclosed in the answer, as from the testimony of *Mong* himself: and one of the questions which arises in the case, is, whether a trustee can be permitted to purchase the *cestui que trusts* property, levied upon and sold at a sheriff's sale, without any instrumentality of his. As decisive of this question, we refer to 7 *G. & J.* 1. The trustee thus purchasing, will be entitled to re-imbursement for his expenditures in the purchase, but he cannot deprive the *cestui que trust* of the benefit arising from the purchase, if there be such benefit. 3 *Des.* 25.

But, it is supposed, that whatever may be the general rule on this subject, that in the case before us, there was a trust coupled, with an interest, which authorized the purchase for his own benefit. The trustee had an interest in the satisfaction of his own claims, it is true, but equity would seem to demand, that all his acts, in relation to the trust property, should enure in equal proportions to the benefit of others, according to the extent of their claims, as well as to himself. This point seems to have been involved in 7 *Gill & John.* 2.

Another question is, whether the sale ought not to be considered, as ratified by long acquiescence; after a knowledge of the facts, which will impeach a sale, a party would be bound, in a reasonable time, to proceed, and if he do not, he will be presumed to have acquiesced. Here a period of eighteen years has elapsed, from the sale to the filing of the bill; but as far as the records presented the case, it would appear to have been an ordinary sale to *Boyd*, by the sheriff, and it seems only to have been discovered at the filing of the answer, that *Boyd* had purchased for the trustee; so that the complainant proceeded upon this new state of the case to vacate the purchase immediately thereafter. It is true, the complainant attended the sale, and was requested to bid, but declined, and did not express dissatisfaction therewith. But it does not

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appear, that he then, or at any subsequent time, until the institution of these proceedings, had any notice or knowledge that *Boyd* was purchasing for the trustee. We therefore think, there is no ground to impute any acquiescence to the complainant.

In view, therefore, of all the circumstances of the case, we are of opinion, that the sale thus made, is voidable, at the election of the complainant; and that the land described in the proceedings, and yet remaining, at the institution of this suit, in the possession of the defendant *Mong*, should be sold; and that the purchase money, after allowing to the defendant all the monies by him paid and applied, to the purposes of the trust, and also for all necessary and proper expenditures upon the land, and permanent improvements thereon, over and above the profits of said lands, shall be applied to the purposes of the deed of trust, made by *Berger*, on the 27th July 1820; and that the cause should be remanded, to the county court, that the principles of this decree may be carried into effect by further proceedings therein.

DECREE REVERSED.

SAMUEL B. BARRELL, vs. JAMES GLOVER, ET. AL.—*December*, 1844.

An action of debt cannot be maintained upon a deed of mortgage, reciting that the grantee was indebted to the grantor in a sum certain, and that the deed was executed for the better securing the payment thereof, with a proviso, after the *habendum* of the instrument, that upon payment of the money the deed should be void, there being no covenant in the deed to pay the debt.

APPEAL from *Allegany* County Court.

This was an action of *debt*, instituted on the 6th February 1841, by the appellees against the appellant.

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The plaintiff filed in the cause the following indenture.

This indenture, made this 22nd August 1836, between *Samuel B. Barrell* of, &c., of the one part, and *James Glover*, *James Percy*, and *Lewis McMillan*, of the other part. Whereas, the said *Samuel B. Barrell* stands indebted to the said *James Glover*, *James Percy*, and *Lewis McMillan*, in the sum of \$5000, current money, to be paid to them by the said *Samuel B. Barrell*, on or before the 22nd day of August 1837, with legal interest thereon until paid, and for the better securing the payment thereof, with interest as aforesaid; the said *S. B. B.* hath agreed to execute, and doth execute these presents. Now this indenture witnesseth, that the said *S. B. B.*, in consideration of the said debts or sum owing to the said *J. G.*, *J. P.*, and *L. McM.*, as aforesaid, and for the better securing the payment thereof, with interest to the said *J. G.*, *J. P.*, and *L. McM.*, their, &c.; and also in consideration of the further sum of, &c., to him, the said *S. B. B.*, in hand, well and truly paid, by the said *J. G.*, *J. P.*, and *L. McM.*, at or before sealing and delivery of these presents, the receipt whereof, &c., hath granted, bargained and sold, released and confirmed, and by these presents doth grant, bargain and sell, release and confirm unto the said *J. G.*, *J. P.* and *L. McM.*, their heirs and assigns, all that tract or parcel of land called "*Water Works*," lying in *Allegany* county, aforesaid. To have and to hold the said tract of land called "*Water Works*," unto the said *J. G.*, *J. P.* and *L. McM.*, their heirs and assigns forever. Provided always, and it is the true intent and meaning of these presents, and of the said parties thereto, that if the said *S. B. B.*, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, to the said *J. G.*, *J. P.*, and *L. McM.*, their, &c., the said full sum of \$5000, with legal interest for the same, on or before the 22nd August 1837, without any deduction or abatement whatsoever, then and from thenceforth, these presents, &c.

The plaintiffs declared, that whereas the said defendant heretofore, &c., by a certain indenture, then and there made, between the said plaintiffs of the one part, and the said de-

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fendant of the other part, which said indenture, sealed with the seal of the said defendant, the said plaintiffs now bring here into court the date whereof is the day and year aforesaid, acknowledged himself to be indebted to the said plaintiffs, in the sum of \$5000, current money, to be paid to the said plaintiffs, by him, the said defendant, on or before the 22nd day of August, in the year 1837, with legal interest thereon, until paid. Nevertheless, &c.

After *oyer* of the deed, the defendant demurred generally to the declaration, in which the plaintiffs joined.

The county court rendered judgment in favor of the plaintiff, for the debt claimed in the declaration, and the defendant appealed to this court.

The cause was submitted without argument to ARCHER, DORSEY, CHAMBERS, SPENCE and STONE, J.

By F. A. SCHLEY for the appellant, and

By ALEXANDER for the appellees, who cited *Penn & Digges, ex. of Digges vs. Carroll, et al. Mss. Decr. 1836.*

BY THE COURT.

JUDGMENT REVERSED, WITH COSTS AND
JUDGMENT FOR THE APPELLANT.

JOHN O. WHARTON, ABRAHAM BARNES, AND MELCHIOR B. MASON, vs. JOHN T. CALLAN.—*December, 1844.*

Where the defendant made his note payable to the plaintiff, who passed it away for value, and afterwards, the plaintiff paid it, he may maintain an action for money paid for the defendant, though after the note fell due, and *before* the plaintiff had paid his endorsement, the defendant was released under the act for the relief of insolvent debtors.

APPEAL from *Washington County Court.*

This was an action of *assumpsit*, brought by the appellee against the appellants, on the 16th March 1842. The plaintiff declared.

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1ST. On the note of the defendants, dated the 20th April 1839, payable on or before the 1st November 1839, to the plaintiff for \$1000.

2ND. On an *insimul computassent*, on the 1st March 1842, and a balance due plaintiff of \$1000.

3RD. For money paid, laid out and expended, &c.

The defendants pleaded in bar :

1ST. *Non assumpsit*.

2ND. That as to 1st count in the declaration, the plaintiff, after the making and delivery of the note, declared on to him, endorsed and delivered it to *R. C. W.*, which said *R. C. W.*, prosecuted the said appellants to judgment upon the said note.

3RD. That on the 12th May 1840, the said *Abraham*; on the 18th August 1840, the said *Melchior*; and on the 16th March 1841, the said *John O.*; respectively became, and were petitioners for relief under the acts relating to insolvent debtors; were severally, and in due course of law, discharged from their debts, and finally released; and that the plaintiff is only entitled to a qualified judgment, to affect future acquisitions by gift, &c. This plea contained full and formal averments of the proceedings of the appellants to a final release, &c.

The plaintiff joined issue on the 1st plea, and replied to the 2nd plea of the defendants below, as follows:

The plaintiff saith, that he, &c., ought not to be barred, &c. That although true it is, that the said plaintiff did, for a valuable consideration paid to him, assign and endorse over, and deliver to the said *Richard C. Washington*, the said promissory note, mentioned and described in the *first* count of the said declaration, and the said *Richard*, as such endorser or holder of said note, did institute suit on the same, in *Washington* county court, against the said defendants, and recovered judgment against them in said court, as stated in the said plea of the said defendant, by them secondly above pleaded, yet the said plaintiff in fact saith, that the said *John O. Wharton*, to wit: (here state and finally set out the respective applications of the several defendants, for the benefit of the insolvent

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law, and its supplements, and their respective discharges under the same,) and the said plaintiff says, that the said judgment, so recovered by the said *Richard*, against the said defendants, was in no way paid or satisfied by the said defendants, other than by their said respective discharges under said act of Assembly, and its several supplements; whereby, the said *Richard*, was prohibited from issuing any writ of execution, or other process on said judgment, whereby he could affect either the persons or property of said defendants, or either of them; except such property of said defendants as was not included in their schedules, returned in their said applications, of which the said plaintiff says there was none. And the said plaintiff, in fact, further saith, that because of the said insolvency of the said defendants, and their failure to pay, or in any manner satisfy said judgment, the said *Richard*, as holder and endorser of said note, in the first count of said declaration mentioned, afterwards, and after the said defendants were discharged as aforesaid, to wit: on the first day of February 1842, at the county aforesaid, demanded and received from him, the said plaintiff, as endorser on said note as aforesaid, the full amount of said note then due, and he, the said plaintiff, as such endorser, then and there paid to the said *Richard C. Washington*, a large sum of money, to wit: the sum of \$1200, current money, in full, for the said claim of said *Richard*, on him, the said plaintiff, on said promissory note, on which said judgment was rendered; by virtue of which said payment by him, the said plaintiff, to the said *Richard*, a right of action to recover the same from the said defendants, hath accrued to him, the said plaintiff; and this he, the said plaintiff, is ready to verify; wherefore he prays judgment on the 1st count; and his damages by him sustained, on occasion of the non-performance of the said promise and undertaking of the said defendants, in the said first count, in the said declaration mentioned; to be adjudged to him, &c.

Replication to 3rd plea.

The said plaintiff saith, that the said defendants, heretofore, to wit, on the 20th day of April 1839, at, &c., made their cer-

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tain promissory note in writing, bearing date the day and year aforesaid, and thereby, then and there, on or before the first day of November 1839, they, or either of them, promised to pay to the said *John F. Callan*, or order, for value received, \$1000; and then and there, delivered the said note to the said *John F. Callan*; and the said plaintiff, to whom, or to whose order, the payment of the said sum of money, in the said promissory note specified, was to be made, after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit: on the first day of November, in the year 1839, at the county aforesaid, endorsed the said promissory note, by which said endorsement, he, the said plaintiff, then and there, ordered and appointed the said sum of money, in the said promissory note specified, to be paid to one *R. C. W.*; and then and there, by said endorsement and assignment, bound himself to be responsible for the payment of the same, without the form of a protest of said note; by means whereof, and by force of the statute, in such case made and provided, the said defendants then and there, became liable to pay to the said *Richard*, the said sum of money in the said note specified, according to the tenor and effect of the said promissory note; and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit: on the fourth day of November 1839, at the county aforesaid, undertook, and then and there, faithfully promised the said *Richard*, to pay him the said sum of money, in the said promissory note specified, according to the tenor and effect thereof, yet the said defendants wholly failed to pay to the said *Richard*, the said sum of money, in the said promissory note specified; and thereupon, the said *Richard*, afterwards, to wit: at the March term, in the year 1840, in *Washington* county court, at the county aforesaid, impleaded the said defendants, in a certain plea of trespass on the case on promises, to the damage of the said *Richard*, in the sum of \$2000, for the not performing the said promise, to pay said promissory note; and such proceedings were, thereupon, had in the said court; that afterwards, to wit, on the 23rd day of March 1841,

the said *Richard*, by the consideration and judgment of the said court, recovered in said plea against the said defendants \$2000, for his damages which he had sustained, as well by reason of the not performing the said promise and undertaking, to pay said promissory note, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendants were convict, as by the record and proceedings thereof, still remaining in this court, will more fully and at large appear; and the said plaintiff further says, that the said defendants never paid, or in any manner satisfied the said judgments; but obtained a release, from the same, by their respective applications for the benefit of the said act of Assembly, and its several supplements; and their several discharges under the same, at the several times and in the manner stated and set forth in their said third plea; whereby, and because of said discharges of said defendants, without having in any manner paid or satisfied the said promissory note, or said judgment for the recovery of the same, the said *Richard*, afterwards, and after the said discharges of said defendants, to wit, on the first day of February, in the year 1842, as endorsee and holder of said promissory note, demand of him, the said *John F. Callan*, as endorser on said note, and as security to him for the payment of the same by the said defendants, the said sum of money specified in said promissory note, and all interest due on the same; and which said sum of money, the said *John F. Callan* was bound in law to pay; and the said plaintiff further, in fact saith, that he did afterwards, and after the said discharges of said defendants, under said act of Assembly, and its several supplements, to wit, on the first day of February 1842, at the county aforesaid, pay to the said *Richard*, as holder and endorser of said promissory note, and in satisfaction of the same, the sum of \$1200, current money; and which said sum of money the said plaintiff saith, was so much money laid out, expended, and paid by him, the said plaintiff, at the special instance and request, and to and for the use and behoof of them, the said defendants, since their said respective discharges; whereby, notwithstanding said discharges, action hath

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accrued to him, the said plaintiff, to demand and recover from them, the said defendants, the said sum of current money, so paid for them as aforesaid; and this, he, the said plaintiff, is ready to verify; wherefore he prays judgment, and his damages by him sustained, on occasion of the non-performance of the said several promises and undertakings, in the said declaration mentioned, to be adjudged to him, &c.

The defendants demurred generally to the replication to the *third* plea, in which the plaintiffs joined. The county court rendered judgment on the demurrer for the plaintiffs, and damages were assessed by consent. The defendants prosecuted the appeal.

The cause was argued before ARCHER, DORSEY, CHAMBERS, SPENCE, STONE and SEMMES, J.

MASON, for the appellants, maintained, as this was not the case of a security suing his principal, upon the ground of payment made, after the principal had been released by operation of law, the action could not be maintained. And he cited, 3 *D. & E.* 341, 98, 599. 3 *Wilson*, 346.

The appellee was a *bona fide* creditor of the appellant, by reason of the note, and as the note could have been proved by him, as a debt against the insolvent's estate, there was no liability over. 4 *D. & E.* 825.

At this point of the argument, R. JOHNSON, also for the the appellants, enquired, if the court would hear an argument in opposition to their judgment, in the appeal of *Harris vs. Oliver, E. S. Mss.* In that case, the note was made for the accommodation of the endorser, who, after his release as an insolvent debtor, was offered as a witness for the maker of the note; and it was held, as the witness would be liable over to the defendant, who offered him, upon his paying the note, he was incompetent to testify.

The court, upon consultation at the bar, said the principle of that decision would not be disturbed.

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F. A. SCHLEY for the appellee.

This case is not distinguishable in principle, from *Harris vs. Oliver*. The endorser, here, has no right of action, until he has paid the note. Until then, he has no debt to prove.

Callan would not be permitted to question the appellant's right to a release, until he had paid.

The rules applicable to bills of exchange, are only applicable to notes after endorsement. *Byles on Bills*, 17 *Law. Lib. Smith's Mer. Law.* 163, 164. *Chitty on Bills*, 553. 2 *Burr.* 676. *Burr.* 1224. 1 *G. & J.* 175.

Notes after endorsement, take the character of inland bills. The rules, as to bills creating rights and duties, show that endorsers are mere sureties, entitled to such rights, and will be protected accordingly. *Chitty*, 266. An endorsement is an indemnity, provided due notice is given of failure to pay by the maker. *Callan* is in law, as the drawer of a bill, and hence, a security for the acceptor. *Chitty on B.* 333, note 1, states the order of liability, as to the several parties to the instrument. 3 *Boss & Puller*, 366. 4 *Bing.* 720. 16 *Law. Lib.* 136, 137, 138. 3 *Kent Com.* 86.

Nothing will discharge the acceptor, but payment and release, or what is equivalent to a release. A discharge under insolvent law, is neither 4 *Bing.* 717. 15 *E. Com. Law, R.* 126.

Callan had no control over the bill at the time of insolvency. He had parted with it. The endorser's rights arise on payment of the note. 1 *Lord Ray.* 742. 3 *H. & J.* 132, 133.

By payment by the endorser, after his payment a new contract is created. 17 *Law. Lib.* 161.

Before this he had no right of action. Then can the prior release affect him? Can it operate on a contract not then in existence? The insolvent law only affects the debts due at the period of arrest. Yet it is no satisfaction. The debt still remains. 4 *D. & E.* 447.

Then a surity who pays the debt, is not precluded by the prior insolvency of his principle: any other construction would be unjust.

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REVERDY JOHNSON in reply.

The thing to be accomplished by the act of 1805, ch. 110, sect. 5 and 13, was the emancipation of the debtor from all his then engagements, from the incumbrance of his debts. All his property was to be surrendered up; nothing was to be kept for contingencies. All property, real, personal, and mixed, was to be conveyed. The 5th section discharges the debtor from all debts due, owing or contracted; all his covenants, all his promises, all discharged; every form of agreement, deed, or contract, is discharged. The petitioners under the act of 1805, (which afterwards was made the basis of our general system,) were merchants; all indebted on negotiable paper. The legislature designed to apply the act to negotiable paper, for all the petitioners were then so indebted. The endorser, here, is a creditor, by force of the original contract; and by that alone. The act was to release a petitioner, but no other person. It contemplated, that other persons might be liable, but it was *the debt* with reference to the *original debtor*, the legislature struck at. The 13th sect. gives relief as to subsequent arrests, upon antecedent contracts; and a party can only apply once in two years. The case cited from 4 *D. & E.* 447, has no application here. It relates to a release under the *Lord's* act, which has no resemblance to our law. A release there, is a statutable payment of the particular debt, for which the party was executed. 2 *Sell. Prac.* 346

Hence, there must be a remedy, still, in favor of the creditor, who had not charged the debtor in execution. 3 *Wilson* 262. 1 *Term Rep.* 598, 346, are cases, in which there was no obligation on the part of the debtor, to pay at all; no consideration; no right of action; 3 *H. & J.* 125. Failure of consideration, unless in cases of *mala in se vel prohibita*, can only be taken advantage of by immediate parties to the contract. As to *third* persons, the question is not open. Where a holder of a note has given value, it is immaterial whether the instrument was, originally, an accommodation to another or not. This is all that 3 *H. & J.* 125, decides. The case before us is altogether different from

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that. The appellants were bound to pay *Callan*. On failure to pay, they were fixed as to him. *Callan* was fixed, as to *Washington*; who might have had two judgments, yet but one satisfaction. How then did *Callan* stand to the makers after judgment? He might pay, demand an assignment of *Washington's* judgment against the appellants, and have it entered for his use. Then *Callan* was bound to pay. Yet it is argued, if he refused and postpones payment, he may recover. But if he does his duty and pays promptly, he cannot. This cannot be: he is then a creditor, and bound by the act of insolvency, where legal and equitable creditors may all come in.

BY THE COURT—

JUDGMENT AFFIRMED.

WILLIAM M. BEALL AND THERESA McELFRESH, ADM'R. OF
JOHN H. McELFRESH, vs. GEORGE SCHLEY, DAVID BARR
AND CHRISTINA BARR.—*December, 1844.*

M, by his last will, devised to one of his three sisters, certain real estate in fee, and constituted her his residuary legatee, and devisee; he bequeathed to her all his "money, choses in action, and all the rest, residue, and remainder of my (his) property, real, personal and mixed, (not hitherto devised or bequeathed,) of which I am now possessed, or of which I may be possessed, at the time of my death, to her, her heirs and assigns, forever." M. also devised real and personal estate, in trust, for his other two sisters. After the publication of this will, the testator purchased other real estate, and died without republishing it. HELD, that the two sisters, who took trust estates, could not also claim as heirs at law, their proportion of the after acquired estate; which, in this case passed under the residuary clause. No person will be compelled to make an election unless the intention of the testator be sufficiently made out. There never can be a case of implied election, but upon a presumed intention of the testator.

The degree of intention necessary to raising a case of election, must plainly appear on the face of the will.

Where a testator declares in express terms his design to make T. his residuary devisee, and explicitly announces of what, by devising to her the remainder of the property of which he was *then* possessed, or of which he might be possessed, *at the time of his death*; this is evidence of his intention to devise all the estate of which he might die possessed; and upon the equitable principles of election, is a devise to that extent.

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The doctrine of equitable election is as applicable to an heir at law, as to other devisees; and may result, either from an express, or an implied condition.

A man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument; if he claims an interest under it, he must give full effect to it, as far as he is able. He cannot take what is devised to him, and at the same time, what is devised to another; hence, he must elect which he will take of the two devises.

The rule, that a will is inoperative to pass lands acquired after its execution, will not prevent the application of the doctrine of election.

Void wills, as of *femes covert*, or infants, do not demand an election; so a will not executed according to the statute of frauds, creates no case of election, from implication. Such wills cannot be read as evidence.

The modern English cases do not enlarge the principle of election.

The court will fix a time, in their decree, within which a devisee bound to elect, must make an election; and if the election is *not* to take the estate, in fact used and enjoyed under the will, the court will further decree an account of rents and profits of the part so held and used.

APPEAL from the equity side of *Frederick* County Court.

The appellees in their bill alleged, that *Caspar Mantz*, being seized and possessed of a large real and personal estate, did, on the 29th August 1832, publish his last will and testament; and about the 29th October 1839, died without having revoked, or in any manner altered or changed his said will. That *John H. McElfresh*, named in said will, took upon himself the burden of executing all the trusts imposed upon and confided to him by said will; both as the sole executor of said will, as also the trustee for the several parties, devisees, and legatees, named in said will. That in and by said will and testament, the said testator did, among other things, devise and bequeath to the said John, &c., (for a statement of which devises and bequests, see the will *post.*) That the said *J. H. McE.*, after the death of said testator, gave to your oratrix, *Christina Barr*, wife of *David Barr*, full and immediate possession of said farm, so devised to her as aforesaid, in compliance with the direction of said testator; and she has, ever since, received and enjoyed the rents and profits thereof. He also received and paid over to her, the dividends received by him on said bank stock; also, the rents on the dwelling house of said testator, and the several lots of ground in *Frederick* town;

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as devised as aforesaid, for the use of your oratrix. But the said *McElfresh*; in his life time, did not pay over to your oratrix any part of the interest due her on the said sum of \$32,000; contending, that he was not bound to pay the same until two years after the death of said testator; that he was entitled to hold the said sum, free of interest, for one year after the death of said testator; so that your oratrix would be entitled to receive interest on said sum, from the 29th day of October 1840, and not before; to which your oratrix objected, and the said *McElfresh*, therefore, withheld from her the said interest on said \$32,000; that the said *J. H. McE.* died some time in the month of July 1841, intestate, and that letters of administration on his goods and chattels, rights and credits, have been granted by the Orphans court of *Frederick* county, to his widow, *Theresa McElfresh* and *William M. Beall*, who are acting as such administrators; your orator and oratrix further charge, that the said *J. H. McE.*, in his life time, received and held in his hands, for the use of your oratrix, the interest on said \$32,000; and that he also received from the assets of said testator the said principal sum of \$32,000, and had the same so invested or loaned, as to produce and yield annually, the legal interest of the same; which ought to have been, but which was not, paid over to your oratrix, during the life time of the said *J. H. McE.*; that some time after the death of said *J. H. McE.*, your oratrix applied to his said administrators to pay her over the dividends on said bank stock, that had accrued in part, and had not been paid over to her in the life time of said intestate, and which had in part accrued since his death; as also to pay over to her certain rents that had become due on the real property lying in *Frederick* town; and also the interest, due to her under the will of her said brother, on the said sum of \$32,000; but they refused payment of any part to her; saying, that any payment to be made by them, must be made to whoever might be appointed the trustee for your oratrix, in the place and stead of the said *J. H. McE.*, deceased. That your oratrix being much in want of the money, which her brother's bounty had so kindly provided for her, immediately filed her pe-

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tition, together with her husband, in this honorable court ; and obtained an order appointing *George Schley* her trustee, to act in the place and stead of the said *J. H. McE.*, in regard to said trusts ; that said *George Schley* has accepted said trust ; that the said *G. S.* as trustee, as aforesaid, in the place and stead of *J. H. McE.*, and by virtue of said order, called on said administrators of said *McElfresh*, to pay into his hands, for the use of your oratrix, according to the provisions and directions of said last will of said *Caspar Mantz*, the \$32,000, in cash, with all the interest due thereon ; as also the rents of the real estate, and the dividends on the said bank stock, that had been received by the said *J. H. McE.* in his life time ; but had not been paid over to your oratrix, the said *Christina*, by him. That the said administrators did pay over to said *George Schley*, as trustee for your oratrix, the rents and dividends on the bank stock received by said *J. H. McE.*, as also the sum of \$28,000, in part of the said principal sum of \$32,000 ; and the sum of \$2426.66, as interest on said \$32,000, from the 29th day of October 1840, being one year after the death of said testator, up to the 3rd day of February 1842 : that being the day on which the payment was made to your orator, the said *George Schley*. But the said administrators refused to pay the remaining \$4000, of the said principal sum, to the said *G. S.* ; and now hold the same in their hands, and refuse to pay it over for the benefit of your oratrix, until, as they say, your oratrix and her said husband will unite in a deed of conveyance : by which, they will convey and release to the said *T. McE.*, as the residuary devisee in said will, all their estate, right, title, and interest both at law, and in equity, in and to a certain farm or tract of land, known as the "*Kenega farm* ;" and which said land was purchased, by and conveyed to, the said *Caspar Mantz*, some considerable time after he had made and executed his said last will and testament. This conveyance your oratrix is unwilling to make, believing, as she is indeed advised, that the said testator died intestate, as to the said land so purchased by him, after he had made his said will, and that the same will descend to his heirs at law, of whom your oratrix is one ; and

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that your oratrix is under no obligation, legal or equitable, to forego her rights as one of the heirs at law, of her said brother, to said farm, to enable her to receive and enjoy the whole bounty intended for her, and given to her by his said last will and testament. But now so it is, &c. Prayer, for subpœna against the appellants, and for relief, &c.

Caspar Mantz devised as follows :

"1st. I devise and bequeath to *John H. McElfresh*, his heirs or assigns, for the purposes, uses, and trusts, hereinafter mentioned, 222 acres of land, more or less, being part of "*Locust Level*," &c.; and \$10,000, money, now in the hands of *J. H. McE.*, bearing interest, &c. It is my wish and desire, and I do so order and direct, that the nett profits arising from the aforesaid farm of 222 acres, after deducting what is necessary to keep said farm and the buildings thereon in good repair, together with the interest arising after my death from the \$10,000, of three per cent funds, in the hands of *J. H. McE.*, and the \$5000 in cash as aforesaid, shall be invested in some good funds, at the discretion of the said *J. H. McE.* I further order and direct, that the said *J. H. McE.* shall pay over to my sister *Eleanor*, out of the nett proceeds of the real and personal estate, above devised, during the life of her husband, as much as the said *J. H. McE.* may think necessary for the comfort of my said sister *Eleanor*, and her children ; but in no event to suffer any part of said proceeds to go into her husband's hands. And any receipt or acquittance which my sister *Eleanor*, though covert, shall execute, &c. I further direct, that should my sister *Eleanor* outlive her husband, that the nett proceeds of the land, and money, and cash, hereinbefore mentioned, shall be paid, semi-annually, to my sister *Eleanor*, &c ; and all the nett proceeds and increase of the said real and personal estate, which may be in the hands of the said *J. H. McE.* at the death of my sister *Eleanor*, shall be equally divided between her children, share and share alike ; but should any of her said children have died, before said division shall be made, and left children, the said children shall be entitled to their mother's or father's share, as the case may be. But

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no division, as aforesaid, shall be made during the life of my sister *Eleanor's* husband, nor until her youngest child shall attain the age of twenty-one years. If in the course of events, it should become necessary for the said *John H. McElfresh* to make a disposition of his worldly affairs, I hereby authorize and empower him to appoint some trusty friend to carry into effect my wishes and directions, respecting the devises and legacies hereinbefore mentioned, and to allow him such compensation as he may think proper.

2nd. I hereby devise and bequeath to *J. H. McE.*, his heirs or assigns, for the purposes, uses and trusts hereinafter mentioned, $454\frac{1}{4}$ acres of land, more or less, &c. It is my will and desire, and I do so order and direct, that immediately after my decease, my sister *Christina* shall go into the possession of the aforesaid farm of $454\frac{1}{4}$ acres, have and enjoy the whole productions and profits thereof. It is my will and desire, and I do so order and direct, that all the other property hereinbefore mentioned, save what is put in trust for my sister *Eleanor*, shall be in the hands of the said *John H. McElfresh*, in trust; the said *John H. McElfresh* is to receive and collect all the nett proceeds of said real and personal estate; and the same, together with all the interest on bank stock and other funds, he shall pay over to my sister *Christina*, to her own separate use, during her natural life, whether she be covert or sole; and any receipt or acquittance of my said sister *Christina*, though covert, given to the said *John H. McElfresh*, touching the trusts hereinbefore mentioned, shall be as valid in law as if she was sole. And further, it is my will, and I do so order and direct, that after the death of my said sister *Christina*, all the real estate hereby devised to the said *John H. McElfresh* in trust, for my sister *Christina*, shall be sold; and I do hereby authorize and empower the said *John H. McElfresh* to convey the same as fully as I could do, and the proceeds arising from said real estate, together with the bank stocks and other funds, and the increase thereof, herein devised in trust, for the benefit of my sister *Christina*, shall be equally divided among the children of my sister *Christina*, that may be then living, share

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and share alike ; and should any one, or more, of her said children have died before said division, then the child or children, of such child or children, shall come in for the same share that the mother or father would have been entitled to, if living. Provided, and it is my will and desire, that no sale or division of the real and personal property, herein devised and bequeathed to *John H. McElfresh*, in trust, for my sister *Christina* and her children, shall be made, until her youngest child arrive to the age of twenty-one years.

3rd. I devise and bequeath to my sister *Theresa*, to her, her heirs and assigns, forever, all the following property, to wit: all that tract of land, being part of a tract of land called "*Tasker's Chance*," &c., to her my said sister *Theresa*, her heirs and assigns forever.

4th. It is my will and desire, and I do so order and direct, that my sister *Theresa* shall pay to *Catharine Clark*, a free coloured woman, \$100 in quarterly payments of \$25 each; in advance, during her natural life. There is a chest of home made linen in my house, if there should be any of it left at the time of my death, it is my wish that it shall be equally divided between my three sisters, *Eleanor*, *Christina*, and *Theresa*. And furthermore, I do hereby make and constitute my said sister *Theresa*, my residuary legatee and devisee ; and do hereby give and bequeath to her all my money, choses in action, and all the rest, residue and remainder, of my property, real, personal, and mixed, (not hereinbefore devised or bequeathed,) of which I am now possessed, or of which I may be possessed at the time of my death, to her, my said sister *Theresa*, her heirs and assigns forever. And finally, I do hereby make, constitute, and appoint *John H. McElfresh*, my whole and sole executor of this, my last will and testament ; and I do revoke and annul all former wills heretofore made by me, relying on his honesty and integrity to carry this, my last will and testament, into full and complete effect. In testimony whereof, I have set my hand and affixed my seal, this 29th August 1832.

CASPAR MANTZ, (Seal.)

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The defendants, *William M. Beall* and *Theresa McElfresh*, in their answer declare, that they admit that *Caspar Mantz* did, on the 29th day of August 1832, make and execute his last will and testament in due form of law, a true copy of which is exhibited as a part of the complainants bill, and that the said *C. M.* died in the latter part of October 1839, without having revoked said will. That *John H. McElfresh*, who was named in said will as executor and trustee, to take charge of the estate of said *Caspar Mantz*, accepted the trust reposed in him, and as to the true character and legal and equitable construction of the trust reposed in the said *John H. McElfresh*, these defendants submit themselves to the determination of this honorable court. That the said *Caspar Mantz*, after the making and executing said last will, purchased a tract of land of a certain *Joseph Kenega*, and obtained, therefor, a deed of conveyance, a true and certified copy thereof is here exhibited as a part of this answer; and that the said *Caspar Mantz*, died, the owner of said land and premises, contained and specified in said deed from *Joseph Kenega*. And these defendants state further, for answer, that the said *Christina Barr*, one of the devisees and legatees aforesaid, and her trustee *George Schley, esq.*, claim to receive the whole of the devises and legacies given to the said *Christina Barr*, by the said *C. M.*; and the said *Christina Barr*, as one of the heirs at law of *C. M.*, also claims one-third of the said land and premises, so, as aforesaid, conveyed to the said *C. M.*, after the making and executing said will; without relinquishing or giving up any part of the testators bounty, given by said will to the said *Theresa McElfresh*, the residuary devisee and legatee. These defendants are advised, that the said *Christina Barr* will not be permitted, according to the rules of a court of equity, to take both under and against the will of *Caspar Mantz*; but that she will be bound, according to the well settled rules in a court of equity, to elect which she will take. These defendants further state, for answer, that they are advised that they are not bound in equity, to pay any more of the legacies bequeathed to the said *Christina Barr* to *George Schley esq.*, her trustee, until the

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said *Christina* make her election, to take under the will and release all right she may have, if she have any, to the said land and premises commonly called the "*Kenega farm*;" and they also state, that the said *Christina Barr* claims both, the bounty of the testator under the will, and a proportion of the after acquired land and premises commonly called the "*Kenega farm*;" which they refuse to yield, until the question of election is finally determined by this honorable court, as a court of equity. These defendants further state, for answer, that they admit that the said *John H. McElfresh* is dead, and that he died intestate, and that these defendants obtained letters of administration from the Orphans court of *Frederick* county, on the estate of the said *John H. McElfresh*, deceased.

The residue of this answer not being deemed material to illustrate this case, as decided, is omitted by the reporter.

After the general replication, the parties filed an agreement showing what had been done under the trusts of *C. M.*'s will; and that a *pro forma* decree be passed by the court for the purpose of taking the case to the Court of Appeals, to determine and settle the questions submitted to the court upon the following propositions, viz :

In this case, if the court shall be of opinion that *George Schley, esq.*, as the trustee of *C. B.*, is, according to the doctrine of a court of equity, entitled to take and receive under and by virtue of the will of *C. M.*, the whole and entire property and money devised and bequeathed to *J. H. McE.*, in trust, for the said *Christina Barr*, and she to take and hold her proportion as one of the heirs at law of *C. M.*, deceased, of the land and premises specified in the deed from *Joseph Kenega* to the said *Caspar Mantz*, and that the said *Christina Barr* and her said trustee can, according to the rules and principles of a court of equity in this State, receive and claim under the circumstances of this case, all the property devised and bequeathed in trust for her, and also as heir at law of *C. M.*, deceased, one-third part of the said land and premises aforesaid, purchased of *Joseph Kenega* by the said *C. M.*, after the making and executing his will, without being put to elect, which she will take ;

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then, and in that case, the court will pass an unconditional decree, ordering and directing the said *Wm. M. Beall* and *Theresa McElfresh* as the administrators of *J. H. McE.*, deceased, to pay to the said *G. S.* as the trustee of *C. B.*, the sum of \$4000, with the interest thereon, from the 3rd day of February 1842, as the balance of the trust funds which were in the hands of *J. H. McE.*, as trustee for said *Christina Barr*, at the time of his death.

But, on the contrary, if the court shall be of opinion, under all the circumstances of this case, that the said *C. B.* cannot, by the said trustee, according to the principles of a court of equity, take, and rightfully claim, all the property and money devised and bequeathed to her by the said *C. M.*, and also, as heir at law of *C. M.*, a proportion of the land and premises specified in the said deed from *Joseph Kenega*; and that this case is one in which the said *C. B.* ought to be put to her election, whether she will take the property bequeathed and devised in trust for her, by the said *C. M.*, in and by his last will; or whether she will take, as one of the heirs at law of said *C. M.*, deceased, her proportion of the land and premises purchased by the said *C. M.* after the making and executing said will of the said *Joseph Kenega*, and that she cannot have and claim both. Then, and in that case, the court will make such a decree in the premises, as shall to the court seem just and equitable, and in accordance with the doctrine of election; and to have the same effect as if a cross bill in this case had been filed, to compel the said *Christina Barr* and her trustee to make their election, how they will take, &c.

On the 4th day of October 1843, *Frederick* county court, as a court of equity, (MARSHALL, A. J.) decreed, that *William M. Beall*, and *Theresa McElfresh*, as the administrators of *J. H. McE.*, deceased, pay to *George Schley*, as the trustee of *C. B.*, or bring into this court, to be paid to him, the sum of \$4000, and the interest thereon, from the 3rd day of February 1842. And it is further ordered, adjudged, and decreed, that the said *Christina Barr* is entitled to claim and hold, by her said trustee, all the property devised and bequeathed in

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trust for her by *Caspar Mantz*, in his last will and testament. And also, she is entitled to hold and claim as one of the heirs at law of the said *Caspar Mantz*, deceased, her undivided third part of the land and premises, purchased by the said *Caspar Mantz*, after the making and executing his last will and testament of a certain *Joseph Kenega*, specified and described in the deed of said land, exhibited in this case by the defendants, as a part of their answers.

The defendants appealed to this court.

The cause was argued before ARCHER, CHAMBERS, SPENCE, STONE and SEMMES, J.

By PALMER for the appellants.

In a court of equity, can one take under a will, and against it? Can he so defeat the intent of the testator? Real property, acquired after the execution of a will, vests in the heirs of law of the testator. Personal property, in the executor. We admit, that after acquired, real property, does not pass under a general devise, in a will. The language of the *Stat. Hen.* 8, has secured that construction. Yet the law of *England* adopts the rule, that one cannot take under, and repudiate the same will. Then, does the equitable doctrine of election apply here? Does it apply at all? Does it apply to an heir at law? *Dillon vs. Parker*, 1 *Swanst. C. R.* 359. 2 *Stor. Eq.* 335, 393, 395.

An election is between two independent alternatives. 2 *Stor. Eq.* 355. Infants and *femes covert* may be compelled to elect. *Snelgrove vs. Snelgrove*, 4 *Dessauss*, 294, 300. *Upshaw vs. Upshaw*, 2 *Hen. and Mumf.* 381.

Exceptions to the rule of election: wills of infants; wills not executed according to the statute of frauds. *Dillon vs. Parker*, 1 *Swanst.* 405, note. *Hearle vs. Greenbank*, 1 *Ves. Sen.* 306, 307. *Sheddon vs. Goodrich*, 8 *Ves. Jr.* 496. 1 *Cox*, note 241.

The exceptions relate to inoperative or void wills. The intention of the testator is not matter of proof. 1 *Dev.* 635.

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On the rule and its application, he cited *Lady Cavan vs. Pulteney*, 2 Ves. Jr. 560. *Wilson vs. Lord John Townshend*, *Ib.* 696, 697. *Ward vs. Baugh*, 4 Ves. Jr. 623. 1 Pow. Dev. 255, 436. *Hixon vs. Oliver*, 13 Ves. 111. *Welby vs. Welby*, 2 Ves. & Beam. 199. 4 Kent. Com. 510. 3 Doug. 361. *Churchman vs. Ireland*, 1 Russ. & Mylne, 250. 2 Sto. Eq. 356. 6 Cruise Dig. 17, 21. *Tit. Devi.* 20, 26. *Bunker vs. Cooke*, 1 Bro. Parl. Cases, 199. *Churchman vs. Ireland*, 6 Con. Eng. Chan. Rep. 237. *Ib.* 4 Simons, 520. *Thelusson vs. Woodford*, 13 Ves. 111, is the very case at bar.

WILLIAM SCHLEY for the appellee.

The intention of the testator must govern; arguments and opinions to show that intent, result from the will itself. 4 Kent, 410.

A will resembles a conveyance. It cannot pass after acquired lands. Not having title, the testator cannot pass them. *Shep. Touch.* 438. *Kemp vs. McPherson*, 7 Har. & John. 335.

The complainants concede, that the land in controversy descended to the heir at law. The three sisters are entitled as heirs at law. The term residue, refers to time of making the will. *Brailsford vs. Heyward*, 2 Dessau, 33. *Van Kleeck vs. The Reformed Dutch Church*, 6 Paige, C. R. 600, and relates to what is not previously disposed of, as to real property; as to personal estate, it relates to the death of the testator. *Oke vs. Heath*, 1. Ves Sen. 141. *Cambridge vs. Rous*, 8 Ves. Jr. 25. *Thelusson's* will did not affect a residue.

Where property is given to A, and also to B, and B takes not only what is granted to him, but also that which is granted to A, and against the intent of the grant which creates both estates; on the doctrines of compensation, an election between the two parcels is enforced, and B not permitted to take both: for one cannot claim under any instrument, without giving full effect to it. 2 Rop. Leg. 378, 386, 389.

Election arises upon grants of property by mistake, but a *residuum* relates to real property devised, retained until the

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testator's death. 1 *Pow. Dev.* 264, note 7. *Smith, et. al., vs. Edrington*, 8 *Cranch*, 68, 97.

It does not relate to *future* acquisitions. *Johnson vs. Telford*, 4 *Con. Ch. Rep.* 409.

The fact is stated in all the cases, that the testator had undertaken to deal with that, which did not belong to him. To raise a case of election, an intent to give that which is not the grantor's own property, must exist. *Churchman vs. Ireland*, 6 *Eng. Chan. Rep.* 237, is stronger than the case at bar. *Ib.* 4 *Con. Eng. Chan. Rep.* 409, 412. 1 *Russ. & Mylne*, 244. *Welby vs. Welby*, 2 *Ves. & Bea.* 187, an heir was put to his election, between lands devised, and lands by descent. The *English* cases are all fully examined. In the *City of Philadelphia vs. Davis*, 1 *Wharton*, 490. *Girard, et al., vs. City of Philadelphia*, 4 *Rawle*. 323. Cases of doubt do not constitute cases of election.

The fact that two have differed about the construction of a will, show it not to be a case of election. *Broome vs Monck.* 19 *Ves.* 609. *Gilb. Eq. Cases*, 15.

There is an implied condition in all cases of election, that devisee will not, and ought not, to claim both estates. The case of *Thelusson and Woodford*, does not affect this cause, which is within *Back and Kett, Jacob*, 534, and decided by it.

Then who is to exercise the right of election here? The *feme covert*? or her trustee for her? or the heirs at law? 2 *Rep. on Leg.* 430.

The heirs at law are entitled to all undisposed of estates. *Sir Thomas Jones*, 112, 114. 8 *Modern*, 90.

All the decided cases are before the court. The doctrine of election is founded on clear, and unquestioned law. To devise on express condition, it will of course apply. So of implied conditions: benefits to A and B; the grant to B, being of A's property; an implied condition not to take both. So where one has power over two estates, grants one to A, and makes an ineffectual attempt as to B. There A must elect upon principles of equity. It would be against conscience not

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to carry out devise to both. Such is the case of *Thelusson vs. Woodford*. But this case is clear of all previously decided causes. *Mrs. Barr* has nothing but the rents and profits; no part of the *corpus* of her estate; after her death the estate goes to her children.

P. J. T. had the whole legal estate, and claimed another estate, which *disappointed the will*: claiming one estate under the will, he could not claim the other estate in opposition to it. If he claim the other estate, he could not claim under the will. Here the trustee of the fund claims: it is not *Mrs. Barr*; she does not take under the will. We do not set up legal rights in opposition to equity: *Mrs. B.* has no power to burthen the estate, sell, or dispose of it; the trust fund cannot be a question in any way; the right of election must arrest the determination of her estate; the thing devised, must be capable of alienation.

REVERDY JOHNSON in reply.

Mrs. Barr must be entitled to one third of the estate, at common law. There is one question, peculiar to the case itself, *i. e.*, what is the true interpretation of the will, which shuts out the heir at law? Looking to the whole character of this devise, at the time the will was executed, it is clear, the testator did *not* design to die intestate, of either his real or personal estate. If intestate, as to the farm in controversy, it must be attributable to ignorance, in fact, of the effect of the devise. As far as relates to *Mrs. Barr* and *Mrs. Harding*, the testator did not intend to vest in them, absolutely, any interest in his estate, so as to subject it to their husbands power. We are not left to speculate about this. The testator knew how to devise absolute, and qualified estates, so as to keep them clear of their husbands. The whole will designed *testacy*, and, to avoid *intestacy*. That is manifest in fact; or, why did he put the words in the last clause? *All he then had*, must pass. These words were put to enlarge antecedent phrases; to include, what they might not embrace. They are not surplussage; they have an independent meaning: and

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they meant, that all the estate he possessed, at the time of his death, should go to the residuary legatee.

As to personal and mixed estate, the will operates upon all; and the words used, put the real estate on same footing; show the *same* state of mind as to *both*. The meaning is, all I have now, or may have, at my death. He meant, that *Mrs. McElfresh* should take under the will, and not as heir. All who take under the will, must admit this. As respects the devisees, the intent was, that *all of them* should take under the will. *Dillon vs. Parker*, 1 *Swanst.* 397, note, 2 *Story Eq.* 339.

The doctrine of election, is more ancient than the case in *Vernon*. It may be traced back to *Elizabeth*. It arises, most frequently, under wills; yet is applicable to deeds. Its justice is recognized every where. A devisee is estopped to deny the testator's power to devise. He, who claims any part, must admit the residue. The right, under grants, rests on the same footing. It is like lessor and lessee; the latter cannot deny title to make the lease.

As to the two devisees, to *Mrs. Barr* and *Mrs. Harding*, being in trust for life, remainder to the children? *Mrs. Barr* has made her acceptance of the life interest, and she now disputes as to the *Kenega farm*. The children have nothing to do with this controversy. The limited character of the interest cannot change the principle. As she takes the trust estate, she is estopped from relying on her rights as heir at law.

A will, not executed in conformity with the statute of frauds, is still good as to personalty. There, the terms of the legacy must be complied with. *Welby vs. Welby*, 2 *Ves. & Bea.* 190.

The rule, for which we contend, has never been questioned, from *Elizabeth* to the present time, and is equally applicable to an heir at law, as to other parties. *Thelusson's* case has never been doubted. Its demonstrative reasoning is conclusive.

2 *Vernon*, 581, (1706,) announces the general rule. It related to devises of fee simple, and fee tail estates, among children. Upon an implied condition, acquittances were decreed, *inter se*. *Forrester* 176. *Ambler* 338. *Wilson vs. Lord John Townshend*, 2 *Ves. Jr.*, 196. *Birmingham vs. Kirwan*, 2 *Scho. & Lef.* 449. 2 *Sto. Eq.* 338, note.

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A will, devising to an heir at law the same estate which would descend to him, does not operate at all; but if, in the same will, the testator devises an estate to another, then the part devised to the heir, operates, upon condition that he gives efficacy to the will. *Freke vs. Lord Barrington*, 3 Bro. C. R. 285, note. *Newman vs. Newman*, 1 Bro. C. R. 186. *Wollen vs. Tanner*, 5 Ves. Jr., 218. *Blount vs. Bestland*, 5 Ves. Jr., 515. *Pettiward vs. Prescott*, 7 Ves. Jr., 541. *Broome vs. Monck*, 10 Ves. Jr., 609, 616.

The rule is stated as a rule of law, applicable to all persons, and all classes of persons.

The case *Thelusson vs. Woodford*, 13 Ves. 209, embraces the contest at bar.

To accept the benefit, while he declines the burthen imposed, is a fraud on the design of the donor.

Crosbie vs. Murray, 1 Ves. Jr., 557, 559. All the provisions of the will ought to be conformed to. This principle covers every variety of case, to which its justice is applicable. The cause of failure is immaterial. Courts look to the will, for the purposes of the devisor to do justice between co-legatees.

The rule can only apply to a defective will: a grant of no title. The true owner of the benefit must elect, to give up his own as the law awards it, or the benefit devised, as the testator granted it. It is enough, here, if the testator intended to pass *Kenega farm*, though it was after acquired land.

The doctrine of election, is a rule of law, established for the sole design of promoting justice; of disposing, equitably, of all the devises in a will; is irrespective of parties; and must apply, with most force, to the testator's own property. If the rule is applied where the property of a stranger is given, it must apply most strongly to the testator's own estate.

From 1806 to this time, except *Sir Thomas Plummer*, all judges have concurred in *Thelusson vs. Woodford*; and indeed it is too clear for doubt. *Mr. Justice Kennedy*, in *Pennsylvania*, mainly relies, that since the revolution, no cases of *English origin* are to be referred to in the courts of that State. In that State they are wiser than all the world put together!

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The rule is maintained in 4 *Con. Ch. Rep.* 209. 4 *Con. C. Rep.* 412. *Kinnard vs. Williams*, 8 *Leigh. Va. Rep.* 400.

Whatever force there may be in 4 *Whart.* 505, 506, as applicable to certain devisees, it has none, as respects a contest between a specific and a residuary devisee, who was to have after acquired property. In the latter case, the specific devisees can only take to the extent of their devises. If one of them is heir at law, and another residuary devisee, then the heir at law is to get no more than the property specifically devised to him. If all, alike, are heirs, specific legatees and residuary, then each should enjoy according to the intent of the will.

Upon the question, whether the court or party in interest should make the election, in cases of coverture and infancy? *Boughton vs. Boughton*, 2 *Ves. Sen.*, 12. 2 *Rop. Leg.*, 426, 430, 433. *Ward vs. Bawgh.*, 4 *Ves. Jr.*, 623. *Long vs. Long*, 5 *Ves. J.*, 445.

The words of this will are very clear, and carefully put, to prevent dying intestate, as to this property.

ARCHER, J., delivered the opinion of this court.

The controversy in the present case, arises under the will of *Caspar Mantz*; and grows out of the following clause in the will:

“And furthermore, I do hereby make and constitute my sister *Theresa*, my *residuary legatee and devisee*; and I do hereby give and bequeath to her all my money, choses in action, and all the rest, and residue, and remainder of my property, real, personal, and mixed, (not hitherto devised or bequeathed,) of which *I am now possessed, or of which I may be possessed, at the time of my death*; to her, my said sister *Theresa*, her heirs and assigns forever.”

Which said will was executed on the 9th day of August 1832.

On the 18th March 1835, he purchased of a certain *Joseph Kenega*, a valuable farm, near *Frederick* town, for which he duly obtained a conveyance; and died on the 29th October 1839.

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It appears by the facts in the case, that the testator left three sisters, *Mrs. Harding*, *Mrs. Barr*, and *Mrs. McElfresh*; and that *Mrs. McElfresh* is his residuary legatee and devisee.

Among other things, the testator devised to *John McElfresh*, in fee, the husband of the residuary legatee and devisee, certain real estate; and fifteen thousand dollars in cash, in trust, for the use of *Mrs. Harding*, for life, and after her death, the whole of the said property to go to *Mrs. Harding's* children; as in the will is particularly specified.

A devise of certain real estate, and thirty-two thousand dollars, besides bank, and turnpike stocks, particularly specified in the will, was made to the same trustee for the benefit of *Mrs. Barr*, for life, and after her death, for the benefit of her children; as set forth particularly in the will.

He also devised sundry lands to *Mrs. McElfresh*, her heirs, and assigns; and in the conclusion of his will, constituted her residuary legatee and devisee, in the terms which have been before set forth.

The question submitted to us under the will, above adverted to, as appears by the agreement, and statement in the record, is, whether *Mrs. Barr*, by her trustee, can claim the property devised in trust to her by the will of *Caspar Mantz*; and also, as heir at law, the one-third of the value of the *Kenega* farm, purchased by *Caspar Mantz* after the execution of his will?

The will not having been republished, it is conceded, that the after purchased lands never passed under it; no matter how clear may be the intention of the testator, in the clause under consideration, to pass them.

The answer to the question will be found in the solution of the enquiry, whether the case is one for election, according to the principles of law applicable to such doctrine? The inapplicability of the doctrine of equitable election, to this case, has been urged upon several grounds:

1st. On the intention of the testator, as deduced from the residuary clause.

2nd. Its inapplicability to an heir at law.

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3rd. Its supposed inapplicability to a clause in a will, which, although it may manifest the intention of the testator, is in itself inoperative to pass any estate by the rules of law. And,

4th. On the ground that the case before us, if the intention were even clear, and if applicable to an heir at law, is not of such a character as comes within the most approved definition of the doctrine.

1. No person will be compelled to make an election, unless the intention of the testator be sufficiently made out. There never can be a case of implied election, but upon a presumed intention of the testator. 3 *Bro. Ch.* 191, 1 *Ves. jr.* 257, 557. The degree of intention necessary to raising a case of election, must plainly appear upon the face of the will. On the other hand, it is said, the court is not to refuse attention, to what amounts to a moral certainty of the testator's intention; where that is to be gathered, either from the state of the property, or the purview of the will. 4 *Bro. Ch.* 24.

What was then the intention of the testator in the residuary clause? It is supposed that the residuary clause may be construed, so as only to shew an intent to pass, that which should constitute a residue of his then existing property, at the time of his death; and not property, which, after the execution of his will, he might acquire. Such a construction would make the testator guilty of the folly of supposing, that without such clause, either the residue at his death would not pass, by the term, "of which I am now possessed," or, that any portion of his property, constituting a part of the residuary, if disposed of by him in his life time, would pass under the will: a supposition we should not be justified in making, when the words, themselves, have so plain an import. His design is declared in express terms, to make her his residuary devisee; and of what, he explicitly announces, by devising the remainder of the property, of which he was then possessed, or of which he might be possessed at the time of his death; the term "*which*," referring in the mind of the testator to the word "*property*," and not to the word "*remainder*." It then stands as a devise of all the estate of which he died possessed, or of which he might be possessed at the time of his death.

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We agree with the Vice Chancellor, in 4 *Sim.*, 520, that such words show in a most marked manner, that he intended to pass, not only the estates he had at the date of the will, but all that he should be in possession of, at the time of his decease. It cannot be denied, that the words would pass all the personal estate, that the testator was possessed of at his death; and if it is clear as to future personal estate, how can it be said he had not the same intention as to real estate, when they are both disposed of in the same sentence? Can any one say, that he had one intention as to personal estate, and a different intention as to the real estate, when he uses "the same words as to both." And he overrules a contrary construction put upon words of the like import, in *Back & Kett*, *Jacobs Rep.*, 540.

2. That this doctrine is applicable to an heir at law, is clear from the authorities. 2 *Vern.* 586. 2 *Ves. Jr.* 696. 2 *Scho. & Lef.* 449. 2 *Story Eq. note*, 338. 2 *Ves. Jr.* 544, 559. 2 *Ves. & Bea.* 187, are all cases where the heir at law was put to his election; and in 10 *Ves.* 593., the point was admitted, that the doctrine reached the heir. The same doctrine was applied in 2 *Eq. Ca.* 2, referred to in 2 *Rop. Leg.* 405; and in the case of 2 *Ves. & Bea.* 187, it was applied in a case, in which the devise to the heir was inoperative.

In the case of an *express condition*, there never could have been a doubt, because the testator may annex what condition he pleases to his estate. Why should not election occur in the case of an implied condition, if the intention be plain and clear, as against the heir? It is said, that the devise to the heir is read as if it were to him absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him, as shall be equal in value to the estates intended for them. It is only carrying out a plain intent of the testator, and giving to the residuary devisee, that which the testator intended, and forbidding the heir from taking property not designed for him. From the earliest case on the subject, the rule is, that a man shall not take a

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benefit under a will, and at the same time defeat the provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it, as far as he is able to do so. He cannot take what is devised to him, and, at the same time, what is devised to another; although, but for the will, it would be his: hence he is driven to his election to say, which he will take.

3. But we have seen that the will is inoperative to pass the lands acquired after its execution. Will this fact prevent the application of the doctrine of election? The *English* cases since the revolution, are, we think, decisive of this subject. 13 *Ves.* 219. 4 *Simons*, 520. 4 *Con. Ch. Rep.* 412. The first of these cases was affirmed in the *House of Lords*, and is considered, notwithstanding the opinion of *Sir T. Plumer*, in *Back & Kett*, *Jacobs* 534, as a case of great authority; and is now the settled law of *England*. We could add nothing to the convincing reasons by which these cases are supported, by the judges who decided them. There are cases of void wills, such as the will by a *feme covert*, or an infant, which certainly, by established cases, will not demand an election; but these have been rightly placed on a ground, which does not affect the present question. So too, a will not executed and attested according to the statute, creates no case of election from implication. They are considered as no wills; they cannot be read as evidence; and there is nothing, therefore, to indicate intention. But in the case before us, the will is properly in evidence; and the intention is clearly indicated. The cases above referred to may be the first in which the law of election was applied to a will, ineffective to pass after acquired lands; but no case from the *English* books has been cited against such application, and we consider them as the strongest evidence of the pre-existing law? We have examined an opposing case, cited from 1 *Whar. Pen. Rep.* 509, but cannot agree with it, in confining the rule of election to the operative parts of the will, from the fear of being led into error, by endeavoring to give effect to an intention imputed to the donor. It would be only in such cases where the inten-

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tion was plain, that the rule would or ought to be extended, and when this is clearly ascertained, it would be unbecoming a court of conscience to allow the heir to take the devise to himself, and also as heir, what was manifestly intended for another.

4. The modern *English* cases do not, we apprehend, extend or enlarge the principle of election. That principle, as applicable to this case, we take to be this ; that no one shall be permitted to take under an instrument, and defeat its provisions ; or, in the language of *Lord Erskine*, a person shall not claim an interest under an instrument, without giving full effect to that instrument as far as he can. This is not a new doctrine ; it will be found to have been announced as long since as the case of *Noys & Mordaunt*, 2 *Ves.* 581. *Lord Redesdale*, in 2 *Scho. & Lef.* 449, 451, says the general rule is, that a person cannot accept and reject the same instrument ; and he declares it to be the foundation of the law of election, upon which courts of equity, particularly, have grounded a variety of decisions in cases, both of deeds and wills.

The complainants allege in their bill, that after the death of the testator, *Mrs. Barr* was put in possession of the lands devised ; that she had ever since been in the enjoyment of the rents and profits ; and had received the interest on the bank stock devised to her ; and that her trustee had received in pursuance of the will, the sum of \$32,000 for her use, and had invested the same ; that she had made efforts to procure the payment of the interest from the said trustee, on the money bequeathed to her.

It thus appears, that her trustee and herself, are in possession of all the estate devised to her ; and she is claiming, as heir at law, the proceeds of the *Kenega* farm, purchased by the testator after the date of the will. By the agreement of the parties, it is conceded, that the court may make a decree in accordance with the doctrine of election, and to have the same effect as if a cross bill had been filed, to compel *Mrs. Barr* and her trustee to make their election ; provided, the court should be of opinion, that *Mrs. Barr* could not claim the devises and be-

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quests made in her behalf; and also claim, as heir at law, her proportion of the lands purchased after the execution of the will; and that this is a case in which *Mrs. Barr* should be compelled to make her election.

We have seen, that the case before us is a proper case for election; and we perceive nothing in the character of the trusts, which should forbid its application; or how any injustice could be done to the children of *Mrs. Barr*, who take, after her death, by the terms of the trust. If *Mrs. Barr* elected to take the property devised, then all her right and title in the property purchased after the date of the will, would be directed to be conveyed to the residuary devisee. If, on the other hand, she elected to take as heir the after purchased land, her life estate in the lands devised and in the property bequeathed, would be gone, and would pass to the residuary devisee; such an election, however, would not affect the persons in remainder, who would take their estates in the property devised; just as they would have taken them, if there had been no case of election under the will.

We shall, therefore, sign a decree, that *Mrs. Barr* and her trustee shall, within sixty days after service of a copy of the decree, make her election; either to take under the will, or to take her proportion of the *Kenega* farm, purchased by the testator after the date of the will; and if she should fail to make her election within that time, that then she shall convey her part of the said *Kenega* farm, which descended to her on the death of the testator, to *Theresa McElfresh*, in fee simple; and the decree shall provide, in case *Mrs. Barr* should elect to take the land descended to her, instead of the devises and bequests to her by the will, that then she shall account for the sums by her received under the will; and that, thereafter, the said trustee shall hold the property devised and bequeathed in trust for *Mrs. Barr*, in trust during the life of *Mrs. Barr* for *Mrs. Theresa McElfresh*. And that the principles of this decree may be carried into effect, the decree of *Frederick* county court will be reversed, and the cause will be remanded to *Frederick* county court.

DECREE REVERSED AND CAUSE REMANDED.

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MARGARET WALTER AND OTHERS' LESSEE, vs. ASHTON ALEXANDER AND SARAH ROGERS ALEXANDER.—*December, 1844.*

Where a defendant offers in evidence collaterally, proceedings in ejectment, and the plaintiff prays the court to instruct the jury, that they do not vest any title in the defendant, and are no bar to the plaintiff's right, such a prayer is not too general, under the act of 1825, ch. 117.

This court must assume, under such a prayer, that every ground which established either of the points relied on in it, was considered and determined by the county court.

The statute 4 *Geo. 2, ch. 28*, requires, that to render a judgment by default, *conclusive* upon the rights of a tenant, and bar his future recovery of the demised premises, it shall be made appear to the court where the suit is depending, by affidavit, that half a years rent was due before the declaration was served, and that no sufficient distress was to be found upon the demised premises, countervailing the arrears of rent then due, and that the lessor in ejectment had power to re-enter; in every such case the lessor shall recover judgment and execution, in the same manner, as if the rent in arrear had been legally demanded.

To make a judgment by default, a bar to a lease under the statute of 4 *Geo. 2*, the record must disclose such facts and circumstances, as will justify the court in believing, or assuming, that in rendering its judgment, the court below designed to exercise the authority conferred on it by the statute.

When all the proceedings in ejectment, until long after the judgment by default, show it to have been an ordinary case of ejectment, having no connexion with the statute, there is nothing to warrant the assumption, that the judgment was rendered under the authority of the statute.

Where the affidavit required by the statute, was filed in vacation, at a different term from that of the judgment, and more than ten months after its rendition; and which, according to the proof, was never shown to the county court, this court will not assume the judgment was given on the affidavit, according to the obvious import and design of the statute.

The affidavit in such cases, should be filed before the judgment by default is entered, or some time during the term at which it was rendered; so that before the judgment became absolute, the court may have had an opportunity of inspecting and adopting the affidavit, as the basis of its judgment.

The court will not presume, that an affidavit was filed, pursuant to the statute, after a lapse of seventeen years, where it clearly appears, that in fact it was not so filed; yet if filed in time, it will be presumed to have discharged their duty in relation to it.

The construction of a statute in every part of the State must be the same; a practice in a particular part of the State, inconsistent with its letter and spirit, cannot repeal it.

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The county court ought not to be called upon, to submit to the finding of the jury, a fact, of which there was no testimony.

A party purchased the reversion in fee of a lot, described as subject to a ground rent, the deed for the reversion being for less ground than the original lease. Afterwards, the rent not being paid, the purchaser of the reversion, brought his action of ejectment to recover possession; declared according to the lease, and recovered judgment by default, and possession. Some years after, the lessee brought another action for the premises described in the lease. **HELD:** that the recovery in the first action, being for more land than the plaintiff was entitled to, was no evidence that the whole reversion of the leased premises had been conveyed to the plaintiff in that action.

APPEAL from *Baltimore* County Court.

This was an action of *ejectment*, brought on the 19th April 1841, by *John Doe*, lessee of the appellants. The plaintiff declared for the following lot:

Beginning, for the same, on the east side of *South street*; south, three and three-quarters degrees east, seventy-nine feet, three inches, from the south-east intersection of *South* and *Water streets*; and running thence bounding on *South street*, south, three and three-quarters degrees east, twenty-six feet, nine inches; thence north, eighty-six and a quarter degrees east, seventy-nine feet six inches, to the divisional line between *Daniel Bowley* and *Jno. McClure*; thence, bounding on said line, north, twenty-six feet nine inches; and thence, by a straight line to the beginning; with the appurtenances situate, and being in *Baltimore* county aforesaid, which *Margaret Walter*, deceased, in her life time, had demised to the said *John Doe*, for a term which is not yet expired; and counted upon separate demises, made on the 1st March 1840, by each of the lessors of the plaintiffs, the appellants in this cause.

The tenants in possession, the appellees, appeared and pleaded *non cul*, on which issue was joined.

1ST EXCEPTION. The plaintiffs, to support the issue on their part, gave in evidence to the jury, that *Daniel Bowley* being seized in fee of the lot of ground for which this suit was brought, executed and delivered the following lease for the same:

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This indenture, made the 21st day of December 1798, between *Daniel Bowley* of, &c., and *Solomon Etting* of, &c., witnesseth, that the said *Daniel Bowley*, for, and in consideration of the payment of the rents, and performance of the covenants, hereinafter mentioned, on the part of the said *Solomon Etting* and his assigns, to be paid and performed; hath demised, &c., and by these presents doth demise, &c., unto the said *Solomon Etting*, his, &c., all that lot of ground situate in the city of *Baltimore*, containing, &c. Beginning, for the same, on the east side of *South street*, south, three and three-quarter degrees east, seventy-nine feet three inches, from the south-east intersection of *South* and *Water streets*; and running thence, bounding on *South street*, south, three and three-quarter degrees east, twenty-five feet nine inches; thence north, eighty-six and a quarter degrees east, seventy-nine feet six inches, to the division line, between *Daniel Bowley* and *John McLure*; thence, bounding on said line, north twenty-five feet; and thence, by a straight line, to the place of beginning: being lot, No. 2, as by a private plot or survey thereof, made and certified by *Jehu Bouldin*, on the 5th day of December 1798; the plot, thereof, now in the possession of said *Etting*, reference thereto, being had, will more fully appear. To have and to hold the said lot of ground and premises, with their and every of their appurtenances, unto the said *Solomon Etting*, his, &c., from the day next before the day of the date of these presents, for and during, and until the full end and term of ninety-nine years, from thence next ensuing, fully to be complete and ended; yielding and paying therefor, to the said *Daniel Bowley*, his heirs and assigns, the yearly rent or sum of \$100. The lease then reserved a right to re-enter for non payment of rent, &c.

The plaintiffs further proved, that such lease, by various mesne assignments, became vested in *George G. Krause*, who duly made and published the following will, which among others, contained the following clause:

Item. I give to the children of my oldest daughter, *Margaret Walter*, the brick warehouse in *South street*, with its appurtenances thereon, during the residue of the term origi-

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nally letten, with the benefit of renewal forever, subject to the yearly rent reserved thereon. The rent thereof, my son-in-law, *Philip Walter*, shall receive, as soon as he and my daughter, *Margaret*, keep house for themselves, and not sooner.

Item. I give and devise to my beloved wife, all my household and kitchen furniture; also, all the stock of horses, cattle, sheep, hogs, and other articles on my farm, during her natural life; and after her death, the whole of her property to be equally divided among my three daughters. Should there be any debts left after my death, it is my will, that all rents arising from said houses, shall be used for defraying such debts; and afterwards, my dear wife shall receive all the rents, until either of my two daughters shall marry.

Item. I do hereby nominate, constitute and appoint *George Schaubert* and *John M. Dosh*, executors. In testimony whereof, I have hereto set my hand and seal, this 30th day of October 1811.

And died; that the plaintiffs are the children of *Philip* and *Margaret Walter*, mentioned in said will, and were minors until 1835; and also proved, that shortly prior to the institution of this ejectment, the plaintiffs offered to *Ashton Alexander*, one of the defendants, who is the husband of *Sarah R. Alexander*, formerly *Sarah R. Merryman*, the other defendant; that said *Alexander* should charge the rents of said property under said lease, from the last day on which payment was made, up to the time of said offer, and all interest thereon, and all expenses incurred by said *Alexander* or his wife, and the interest and credit of the rents of said property, since it was in possession of said *Alexander* or his wife, with interest thereon, and that the plaintiff would pay the difference, if any, whatever it might be, which proposal was refused.

The defendants, to support the issue on their part, offered in evidence the following copy of a deed, from *Daniel Bowley* to *John Merryman*, duly executed, acknowledged and recorded, dated 15th August 1806; conveying the reversion, in fee, to the said *J. M.* and *his heirs*, of the following lot, to wit: Beginning for the same, on the east side of *South*

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street; south, three and three-quarter degrees east, seventy-nine feet three inches, from the south-east intersection of *South* and *Water streets*; and running thence, bounding on *South street*; south, three and three-quarter degrees east, twenty-five feet nine inches; thence north, eighty-six and a quarter degrees east, seventy-nine feet six —; to the division line between *Daniel Bowley* and *John McLure*; thence, bounding on said line, north, twenty-five feet; and thence, by a straight line, to the beginning: being lot, No. 2; as, by a private plat or survey, thereof made and certified by *Jehu Bouldin*, on the 5th day of December 1798; the plat therof, now in possession of said *Etting*, reference being thereto had, will more fully appear; together, &c.

And also offered in evidence, a duly authenticated copy of the last will and testament of said *John Merryman*; by which, the said lot was devised to the said *Sarah R. M.* in fee; and proved, that the said *Sarah*, in said will mentioned, is one of the defendants in this case.

The defendants further offered in evidence, the following proceedings of recovery in ejectment, of the premises mentioned in the declaration; being an action commenced by the said *S. R. M.*'s lessee, against *Isaac J. Smith*, on the 17th March 1823, for all that lot or parcel of ground, lying and being in the city of *Baltimore*, in *Baltimore* county aforesaid: Beginning for the same on the east side of *South* (now called *Belvidere*) *street*; south, three and three-quarter degrees east, seventy-nine feet three inches, from the south-east intersection of *South* and *Water streets*; and running thence, bounding on *South street* south, three and three quarter degrees east, twenty-six feet nine inches; thence north, eighty-six and a quarter degrees east, seventy-nine feet six inches, to the division line, between *Daniel Bowley* and *John McClure*; thence bounding on said line north, twenty-six feet nine inches; and thence by a straight line to the beginning, with the appurtenances; which *Sarah Rogers Merryman* demised, to the said *John*, for a term of years; which is not yet expired, &c. The sheriff returned the copy of the declaration: "Copy set upon the premises, 17th

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March 1823." A judgment by default at March term 1823, was rendered against the casual ejector. The day of the demise was 1st January 1816.

On the 12th February 1824, the said *John Denn*, lessee as aforesaid, by his attorney aforesaid, filed in court here the following affidavit, to wit:

Sarah R. Merryman vs. Isaac J. Smith. Action of ejectment in *Baltimore* county court. *Sarah Rogers Merryman*, lessor of the plaintiff in this cause, made oath on, &c., that at the time of issuing the declaration in this cause, and before the time of serving a copy of said declaration on the tenant in possession of the premises, in said declaration mentioned, there was and now is due, and in arrear to the said *Sarah*, as landlord of said premises, the sum of \$300, for three years rent of said premises; and the further sum of \$49.50, balance due and in arrear for one other year's rent thereof; and this deponent further saith, that at the time of serving the copy of said declaration on the tenant in possession of the premises, in said declaration mentioned, she, this deponent, was and now, is landlord of said premises, and the said *Isaac J. Smith* was the tenant in possession thereof; and that she then had, and now hath power to re-enter on said premises for non-payment of the said rent; and this deponent further saith, that at the time, and before said ejectment was served, no sufficient distress was to be found on said premises, and countervailing the arrears of rent then due to this deponent. Sworn this 3rd day of February, in the year 1824, &c. And on the same day, 12th February 1824, the plaintiff sued out a writ of *hab. fac. pos.*, under which, possession was given, on the 24th February 1824.

And also proved the writ of possession; and further offered evidence, that the said *Sarah*, mentioned in said recovery in ejectment, intermarried before the institution of this suit, with the defendant *Ashton Alexander*, and that said *Sarah* and *Ashton*, have been in possession of the premises declared for in this case, ever since possession was delivered under the writ of possession, issued on said judgment in ejectment, and that

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September term 1823, continued to the fourth Monday of March 1824.

The plaintiff further offered in evidence, that the court was not in session on the day when the affidavit, stated in the record, was filed, and when the execution issued.

The defendant offered evidence, that the terms of *Baltimore* county court have always been adjourned over from the end of one term to the beginning of another. And the defendant offered evidence to the court, by various attorneys at law, of the practice of *Baltimore* county court, as to the time of filing the affidavit, under the statute 4, *Geo. 2*. The practice was stated to be, to file the affidavit at any time before suing out the writ of possession. The defendant, also, filed copies of the docket entries in various actions of ejectment, where judgments, *nisi*, had been entered.

Whereupon the plaintiffs made the following prayers to the court:

The plaintiffs pray the court to instruct the jury:

1st. That the proceedings in ejectment, given in evidence in this cause of *Merryman's lessee vs. Smith*, do not vest any title in said *Merryman*, and are no bar to plaintiffs' right of recovery in this case.

2nd. That as the defendants have produced the record of the ejectment suit between *Merryman's lessee* and *Walter*, for the lot in question in this case, and as a part of that record, the affidavit of the plaintiff's lessee in that case, dated the 3rd February 1824, and filed in court in said case on the 12th day of the same month, that then, in point of law, said affidavit was too late to make the judgment in said case conclusive against the lessee; and the lessors of the plaintiff, in the present suit, claiming the said lot under the lease from *Bowley* to *Ettings*, as a judgment in ejectment, under the statute 4, *George 2nd*, and that such affidavit having been produced by defendants, the jury are not bound to presume, that any other affidavit to obtain or justify said judgment, under said statute, was filed or made before the court rendering the said judgment.

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3rd. That the judgment, *nisi*, against the casual ejector, in the ejectment referred to in the preceding prayer, became a final judgment, after the first day of the term of the court, in which the same was rendered, next succeeding the term at which said judgment was rendered, and that consequently, the said judgment became an absolute judgment, after the first day of the term of said court, which commenced in September 1823; and that the affidavit made by the lessor of the plaintiff in that suit, on the 3rd February 1824, and filed, in said suit, on the 12th of that month, was not in time to authorise such judgment, under the statute of *4th George 2nd*, so as to make the same, and the proceedings in the said case, final and conclusive upon the lessee of the lessor of the plaintiff in that case, and those claiming under the lease.

4th. And the plaintiff further prays the opinion of the court to the jury, that if they find from the evidence, that the affidavit filed in the ejectment suit aforesaid, of *Merryman's lessee*, was not, in fact, submitted to the court by which said judgment was rendered or approved of, or seen by said court, or held by it to be sufficient under the said statute of *George the 2nd*; and if they also find, that no other affidavit in said case was made, that then said proceedings in ejectment are not conclusive upon the rights of the lessor under said statute.

The defendants then prayed the court to direct the jury, that if they should find, that the defendant, *Sarah*, became entitled to the reversion of the ground declared for, as stated in the testimony, and recovered possession, and took, and has ever since held possession thereof, in the year 1824, as shewn by the record of recovery, given in evidence, and that this action was instituted on the 19th day of April 1841, then the plaintiff is not entitled to recover.

The court (MAGRUDER and PURVIANCE, A. J.,) refused the prayers of the plaintiffs.

The prayer of the defendant was granted.

The plaintiffs excepted on both grounds, and the verdict and judgment being against them, they prosecuted the present appeal.

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The cause was argued before ARCHER, DORSEY, CHAMBERS and SPENCE, J.

By RICHARDSON and R. JOHNSON for the appellants, and
By MEREDITH and MAYER for the appellees.

DORSEY, J., delivered the opinion of this court.

The first prayer of the plaintiff is, "that the proceedings in ejectment, given in evidence in this cause, of *Merryman's Lessee vs. Smith*, do not vest any title in said *Merryman*, and are no bar to plaintiff's right of recovery in this case." The objection taken to this prayer as being too general, in not sufficiently presenting, according to the act of 1825, c. 117, the point, which the county court are required to decide, we think cannot be sustained. The points, on which the decision of that court were demanded, were, that the proceedings in the ejectment referred to did not vest any title in *Merryman*, and formed no bar to the plaintiff's right to recover. Every ground, therefore, which established either of those points, we must assume to have been considered and determined by the county court. It was very properly conceded in the argument, that if these proceedings in ejectment, offered in evidence to shew title in the defendants, were not had under the statute of 4 Geo. 2, c. 28, that the judgments therein rendered, vested no title in the defendant's wife, and formed no bar to the plaintiffs right to recover. This statute requires, that to render a judgment by default conclusive upon the rights of the tenant, and bar his future recovery of the demised premises, it shall be made appear to the court, where the said suit is depending, by affidavit, that half a years rent was due before the declaration was served, and that no sufficient distress was to be found upon the said demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment, had power to re-enter; in every such case, the lessor or lessors, in ejectment, shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made. To give to this judgment the efficacy ascribed to

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it, it must appear to this court to be a judgment rendered under the statute of 4 Geo. 2; or, in other words, the record must disclose such facts and circumstances, as would justify us in believing or assuming, that in rendering its judgment, the court below designed to exercise the authority conferred on it by the statute. The record, before us, discloses nothing which could warrant us in any such assumption or belief. All the proceedings in ejectment, until long after the judgment, shew it to have been an ordinary case of ejectment, (having no connexion with the statute,) the judgment in which, is conclusive upon no body. Upon what principle, then, can this court be called on, where an affidavit was filed in the case, in vacation, at a different term from that of the judgment; and more than ten months after it was rendered, and which according to the proof was never shown to the county court, to believe or assume, that its judgment was given on the affidavit thus introduced into the cause? According to the obvious import and design of the statute of 4 Geo. 2, c. 28, we think the affidavit should be filed before the judgment by default is entered, or some time during the term at which it was rendered; so that, before it became absolute, the court may have had an opportunity of inspecting and adopting the affidavit, as the basis of its judgment. That such is the construction of this statute in England, see *Adam's on Ejectment* 159, and *Doe. on Dem. of Hitchings and Another, vs. Lewis* 1 Burr. 614.

It has been contended in this case, that after the lapse of seventeen years, during which the defendants have been in the undisturbed possession of the demised premises, this court ought to presume the filing of an affidavit pursuant to the statute. The proof in this case having so clearly disproved such filing of the affidavit, the court has no ground left for such a presumption to rest on. This case differs essentially from the case above mentioned, of 1 Burr, 614, referred to as warranting the presumption which this court has been called on to make. There, the question arose upon a case stated, in which the proceedings and judgment in ejectment, were stated to have been “under and by virtue of the statute

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of 4 *Geo.* 2, c. 28;" and that fact was strongly relied on by the court, which, after an acquiescence in the landlord's possession, under the judgment of almost twenty years, determined that it was not necessary that the landlord should have produced the affidavit on the trial, in which the proceedings in ejectment were offered as evidence.

We must not be understood as deciding, that to give effect and validity to the judgment of the court, in a proceeding in ejectment, under the 4 of *Geo.* 2, when judgment is incidentally brought before the court, (as in this case,) as evidence of title, that it must appear upon the face of the proceedings, that all the requisitions of the statute have been complied with; that there is no error in the judgment of the county court, which upon appeal or writ of error would cause its reversal. All that we mean to decide is, that to give to a judgment by default in ejectment, under the statute of 4 *Geo.* 2, the conclusiveness designed to be imputed to it by the statute, it is necessary that the affidavit should be filed or presented to the court before the judgment is rendered, or some time during the term at which it was given; so that before it became absolute, the court may have had an opportunity of inspecting and adopting the affidavit as the basis of its judgment, and that such judgment, when offered in evidence, as in this case, was sustained by such an affidavit, as satisfied the court before which it was offered in evidence, that the court by which it was rendered, intended it as a judgment under, and in virtue of the statute 4 of *Geo.*, 2, c. 28.

Nor do we mean to say, that it is requisite that the affidavit should appear to have been presented to the court. If filed at the proper time, the court will be presumed to have discharged their duty in relation to it.

The testimony offered on the part of the defendants, of the loose practice sometimes prevailing in the city of *Baltimore*, of filing the affidavit long after the rendering of the judgment, or as the witnesses state, at any time before the issuing of the writ of *habere facias possessionem*, can have no influence on the determination of the case before us. The construction of

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the statute must be the same in every part of the State; and were it otherwise, the practice referred to, is so entirely inconsistent with both the letter and spirit of the statute, that to sanction such a practice would be, *pro tanto*, to repeal the statute. We think the county court erred in refusing to grant the appellant's two next prayers; for the reasons we have stated, in the consideration of its refusal to grant his first prayer.

The court below, also erred, in their refusal of the appellant's fourth prayer; because, from the uncontradicted record evidence in the cause, it could not have worked injustice to the appellees, but might have operated most prejudicially to the rights of appellant. Under the opinion of this court, the proceedings and judgment in ejectment, relied on by the appellees, formed no bar to the plaintiff's recovery, and the jury were not at liberty to find the filing of any other affidavit. And yet, if that prayer had been granted, the jury would have been authorized in finding, that these proceedings in ejectment were a conclusive bar to the rights of the appellant; if they found that the affidavit, no matter at what time, had been submitted to the court, or approved of, or seen by it, or been held by it sufficient, under the said statute of *George 2nd*; or if the jury found that any other affidavit had been made in the case, no matter when made, or what it might be.

The prayers of the appellant having been rejected by the county court, the appellees prayed the court to direct the jury, that if they should find that the defendant, *Sarah*, became entitled to the reversion of the ground declared for, as stated in the testimony, and recovered possession, and took, and has ever since held possession thereof, in the year 1824, as shown by the record of recovery given in evidence, and that this action was instituted on the 19th day of April 1841, then the plaintiff is not entitled to recover: which prayer was granted, and in doing so, the county court erred, for the reasons stated by us in our examination of the courts refusal of the appellant's first prayer. It also erred for another reason. It called on the court, to submit to the finding of the jury, a fact of which there was no testimony; but which was conclusively

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disproved by the testimony of both parties. It required the court to direct the jury, that if they should find that the defendant, *Sarah*, became entitled to the reversion of the ground, declared for, &c., then the plaintiff is not entitled to recover. Both the lease from *Daniel Bowley* to *Solomon Etting*, and the deed for the ground rent, and reversion from *Daniel Bowley* to *John Merryman*, under whom the defendant *Sarah* claims title, shew, that she was not entitled to the reversion of the lot of ground for which the ejectment was brought; but for a lot of different and smaller dimensions. And it is somewhat remarkable, that the alleged recovery of the lot of ground, by *Sarah*, the defendant in the action of ejectment under the statute of 4 Geo. 2, c. 28, was not of the lot leased, as aforesaid, by *Daniel Bowley*, and to the ground rent and reversion of which she was entitled; but of a lot of larger dimensions.

Dissenting from the county court, in its refusals to grant all the prayers of the plaintiff, and in its granting of the defendants prayer, we reverse its judgment.

JUDGMENT REVERSED AND PROCEDENDO ISSUED.

JOHN WALTER, USE OF SUSANNA WALTER, *vs.* DANIEL WARFIELD, AND OTHERS.—*December, 1844.*

D. sued out a writ of *replevin*, and gave the usual bond, with the other defendants as his sureties, to *J.*; at the trial of the *replevin*, the defendant, *J.*, pleaded *non cepit*, and property in *S.*; and the plaintiff, *D.*, pleaded property in himself. The issues were found for *J.*, with a judgment for a return of property. In an action on the *replevin* bond, entered for the use of *S.*, the defendants, *D.* and his sureties, were permitted to prove in mitigation of damages, that the property really belonged to *S.*, that *J.* had no personal interest in it; and maintain, that he could recover in this action only the amount of damage sustained by him, personally, in consequence of the property being taken from his possession, and could not increase the damages to the extent of *S.*'s right, by showing that he was her agent.

The damages which an obligee in a *replevin* bond can recover from the obligors, are only such as he has suffered personally, by reason of the institution and failure of the action of *replevin*.

Walter use of Walter, *vs.* Warfield *et al.*—1844.

APPEAL from *Baltimore County Court.*

This was an action of *debt*, commenced on the 18th August 1838, by the appellants against the appellees. The plaintiffs declared on a bond of *Daniel Warfield* and his sureties, to *John Walter*, to prosecute the action of replevin, mentioned in the exceptions, with effect, dated 25th July 1836. The defendant pleaded general performance; and the plaintiff replied by way of breach, setting out the proceedings in replevin; and the judgment thereon, that the plaintiffs, the appellees aforesaid, “should take nothing by their writ, and that the said *Walter* should have a return of the said goods and chattels, in said condition mentioned, to be detained to him forever irrepleviable, and that he should recover his costs &c.,” that no return was made, nor costs paid, and so, &c. Rejoinder by the appellees, that, &c., in said condition mentioned, did well and truly return the goods and chattels, &c., on which issue was joined.

The plaintiff, to support the issue on his part, offered in evidence the replevin bond, the record in the replevin suit, mentioned in the condition of said bond, and the docket entries, as follows :

“*Daniel Warfield* and *Samuel Mactier vs. John Walter. Replevin*, nar. and notice to plead, filed. Replevied and delivered, as per schedule, and defendant summoned. 1st September 1836—appearance, rule, plea; same day, motion for a return of property. 30th December 1836—pleas, *non-cepit*, and property, and notice to reply filed; rule, replication, service of copy and notice of rule admitted; same day, similiter to 1st plea, and general replication to 2nd plea filed, service of copy admitted, continued. January 1837, continued. May, continued. September, continued. January 1838, continued. May term—15th June 1838, jury sworn. 18th June 1838, verdict for the defendant. Judgment on the verdict for a return of property and costs.

Defendant’s costs, \$49.39½.

Test,

THOS. KELL, Clk.”

Walter use of Walter, vs. Warfield *et al.*—1844.

The defendant, *John Walter*, in the action of *replevin*, pleaded. 1st, *non-cepit*. 2nd, property in *Susanna E. Walter*.

The plaintiffs, *W.* and *M.*, joined issue on the 1st plea. 2nd plea, property in themselves.

And further to prove the said issue, the plaintiff offered testimony by *Hiram C. Walter*, of the value of the property taken by the said writ of *replevin*.

The defendants, in order to show that the property in question was not in the plaintiff, at the institution of the said action of *replevin*, but in a certain *Susanna E. Walter*, the same person mentioned in the plea of the present plaintiff, filed by him as defendant in the said action of *replevin*, and making said offer only with a view to mitigate the damages in the present action, proposed to ask said witness if he was not the original owner of said property, and whilst such, did not execute a bill of sale of said property, conveying and transferring the same to said *Susanna E. Walter*, and in connexion with said proof, offered with the like purpose to read in evidence to the jury, an authenticated copy of said bill of sale, to said *Susanna* from said *Hiram*, and to prove that the said bill of sale contains and conveys the property in dispute in this case. The bill of sale was dated 16th May 1835.

To the admissibility of which evidence the plaintiff's counsel objected, but the court (*PURVIANCE*, A. J.,) overruled the objection, and suffered the said proposed evidence to be given to the jury in the present case, as evidence in mitigation of damages, for the purpose for which the same was, as aforesaid, offered to be given; the plaintiff excepted.

2ND. EXCEPTION. The plaintiff and defendants having given the evidence in support of the issue on their respective parts, stated in the foregoing bill of exceptions, and which is made part of this exception, the plaintiff to show himself entitled to recover for said *Susanna's* benefit the full value of the chattels mentioned in this suit, further offered to prove, that the plaintiff, at the time of the *replevying* of said chattels, held and claimed the same only as agent of said *Susanna E. Walter*, named in the pleadings in said *replevin* suit, and that the plaintiff de-

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fended the same for her, and at her expense, and under her direction; and that this suit was instituted at her instance and for her use, and has been conducted by the plaintiff for her use, and at her expense; and that this suit has been entered for her use on the docket, under an order signed by the plaintiff, but for the first time this day by virtue of the order signed as aforesaid, dated and filed this day, and which order is as follows:

“*John Walter vs. Daniel Warfield and others.* In *Baltimore* county court. *Mr. Kell*,—Enter this case for the use of *Susanna E. Walter*. JOHN WALTER. CHARLES F. MAYER, Plff’s Att’y. 13th December 1842.”

But the defendant objected to the admission of said testimony, offering at the same time to give in evidence, that heretofore, to wit, on 30th December 1836, there was brought by said *Susanna* against the said defendant, *Warfield*, and *Mactier* his partner, plaintiffs in said replevin, an action of trespass, for the taking and carrying away, by virtue of said replevin, the same property, the value of which is now sought to be recovered for her use in this action, in the manner stated in this exception; and that in the said action of trespass, she recovered a verdict and judgment in *Baltimore* county court, at September term, 1838; but which judgment was afterwards reversed, on appeal, by the Court of Appeals, upon the ground that the form of action was misconceived, as well as upon the error of opinion of the county court in the third exception in said case, (it being agreed, that the record of said case in the Court of Appeals, and the statement of the case, and the opinions of the county court and of the Court of Appeals, shall be read in argument of this case in the Court of Appeals, from the report of the case in 11 *Gill & Johnson’s* reports, page 80, &c., to have the same effect as if said case were set out at length in this exception.)

The plaintiff then, in further support of the issue on his part, offered to prove, that the present suit was suspended on his part, from the time of its institution until the decision had taken place in the above mentioned case of trespass, and purposely so, to abide the issue of said trespass case; the defen-

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dants, however, not being informed of such purpose, nor their counsel, until yesterday, after the case was called, the jury sworn, and the plaintiff had given his evidence stated in his first exception, (the offer of this latter evidence so stated as made by the plaintiff in this exception, was, however, after this suit was, as aforesaid, entered for the use of said *Susanna*;) and the court refused to allow the testimony of the plaintiff, offered as aforesaid, to be given. To the admission whereof, the defendants had, as above stated, objected, upon the ground as well of the evidence stated as aforesaid, by the defendants, as upon the general ground, that the evidence, so objected to, was inadmissible; and the court, (PURVIANCE, A. J.,) being of opinion and so directing the jury, that the plaintiff can recover in this action only the amount of damage sustained by him personally, in consequence of the taking of the property from his possession. And the plaintiff objecting to the testimony offered, as aforesaid, by the defendants, as set forth in this exception, the court overruled the objection and allowed said testimony to be given. Whereupon, to said direction of the court, and to the refusal of the court to allow to be given the testimony aforesaid, offered by the plaintiff, and to the court's admission of that offered as aforesaid by the defendants, the plaintiffs excepted.

3RD. EXCEPTION. The plaintiff and defendants having respectively offered the evidence to support the issue on their parts, stated in the foregoing bills of exceptions, which was admitted as evidence, and not excluded, and which is made part of this bill of exceptions, the plaintiff prayed the court to direct the jury, that on the evidence given in this cause, if believed by the jury, the plaintiff is entitled to recover the value of the property mentioned in the schedule, returned with the writ of replevin, and offered in evidence, notwithstanding they may find, that at the date of the institution of said replevin suit, and at the date of the bringing of the present suit, the title to said property was in *Susanna E. Walter*, or any other person. But the court refused to give said direction; to which refusal, the plaintiff excepted.

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The jury found their verdict for the plaintiff, and assessed his damages at \$50, and his claim being for a much larger sum, he prosecuted the present appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and SPENCE, J.

By MAYER for the appellants, and

By WARD and REVERDY JOHNSON for the appellees.

By THE COURT.

JUDGMENT AFFIRMED.

NOTE.—The court refused the application of the appellant, to hear a re-argument of this cause.

EDMUND B. ADDISON vs. ANDREW HACK—*December, 1844.*

In an action relating to lands, if the defendant does not take defence or warrant, the plaintiff is under no obligation to ask for a warrant to locate his land, or any of the matters in controversy, between the parties.

In such case, without plots, he may read his title papers in evidence; prove his possessions under them; and show by oral, and other testimony, the injury he complains of, and for which he seeks indemnity.

In an action for damages, for diverting the course of a stream from its natural channel, on the plaintiff's land, the defendant may show, that the diversion was made on his lands above those of the plaintiff, and that it was rather a benefit, than an injury to the plaintiff; or that it was made in virtue of a verbal agreement between plaintiff and defendant, that the latter might make the diversion, for the purpose of working a mill to be erected by the defendant on his own land, if the defendant would allow the plaintiff the use of a road through the defendant's land, and the execution of such agreement, or that the plaintiff entered into such a contract with the defendant, conferring the privilege, with a fraudulent design, and for the purpose, of extorting money from him.

Such evidence is admissible in mitigation of damages; and for the purpose of showing that the defendant was not a trespasser, *ab initio*, for continuing the diversion after a countermand of his authority by the plaintiff; or that he could not be made responsible in damages for acts done upon his own land, with the verbal permission and authority of the plaintiff.

The maxim, "*volenti non fit injuria*," illustrated.

Where one party authorises another to divert the channel of a stream, flowing through the lands of both, by means of a license which is countermand-

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ble in its nature, and the authority is exercised as granted, the party who has the power of countermand, can only be restored to his rights, by doing justice to the other, and tendering him the expense which he has incurred under the license.

Where the plaintiff verbally agreed to abandon the use of a stream of water in the manner in which it had been accustomed to flow on his land, and the abandonment was consummated by the execution of his license, from that moment, his right to the use of the water, as it formerly flowed in its natural channel, became extinct; and it was no longer appurtenant to his land.

Such license conveys no estate, interest, or use in the land; is not within our registry acts; nor calculated to mislead purchasers.

A prominent object of our enrolment laws is the protection of purchasers.

A grant, not acknowledged, nor recorded, of a power to divert the course of a stream, which flowed through the grantor's land, but which power *had not been executed*, would not be a bar to a subsequent *bona fide* purchaser, for a valuable consideration, without notice, claiming the water right naturally incident to the lands he had purchased. To interpose such a bar, in such a case, the same conformity to the registry laws is necessary, as if land were the subject of the grant.

APPEAL from *Baltimore County Court*.

This was an action *upon the case* brought to the April term, 1841, of said court, by the appellee, against the appellant, to recover damages for diverting a rivulet out of its ancient channel, through the land of the plaintiff, whereby the plaintiff was deprived of the use, &c. The defendant pleaded *non cul.*, on which issue was joined.

1ST. EXCEPTION. At the trial of this cause, the plaintiff, to support the issue on his part, read in evidence to the jury, subject to exceptions, a patent dated 10th May 1754, for a tract of land called "*Soldiers Delight*," and also a patent for another tract of land called "*Timber Grove*;" in both of which patents, the lands therein mentioned are described by metes and bounds; and then, for the purpose of showing that the tract of land mentioned in the declaration, was part of the land mentioned in said two patents, read to the jury, (subject to all exceptions to the competency or admissibility of said proof, for the purpose aforesaid,) a deed from _____ to *Ellis Jones*, dated 16th June, 1811; a deed from _____ to *Charles Willerson* to *Hill*, dated 10th March 1821; and a deed from said *Hill* and wife to *Pennington*, dated 1st

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August 1834. The will of said *Pennington*, admitted to probate 18th March 1837, authorising *Andrew Hack*, (his executor,) to sell and convey the land therein mentioned, upon a deficiency of the testator's personal estate, to pay his debts; and lastly, the deed of the said *Andrew Hack*, (executor,) to the plaintiff, dated 5th March 1840; all of which deeds and said last will, it is admitted, purport and profess to convey or devise, by certain boundaries therein mentioned, "*Part of Soldiers Delight*," and the whole of "*Timber Grove*," And the plaintiff further proved, that he and those under whom he claims, have been in possession of the lands mentioned in the declaration, for twenty-five years, last past, claiming to hold the same under said patents and deeds aforesaid; and that the land from which the stream of water was diverted by defendant, as alleged in the declaration, has been for twenty-five years reputed and known as "*Soldiers Delight*." And the plaintiff gave evidence to show the diversion of the water by defendant, previous to this suit, so as to prevent it from flowing on said land in its accustomed channel, as it had done before such diversion, and rested his case. Whereupon, the counsel for the defendant, then moved the court to exclude from the consideration of the jury, the patent, deeds and will aforesaid, on the ground, that the land in controversy, is not shown to be the same as that mentioned in said patent, deeds and will. And the defendants counsel accompanied said motion with an admission, that previous to the trial of this cause, and when the plaintiff was about to obtain a warrant of survey for the purpose of locating his pretensions, the defendant agreed that the plaintiff should, on the trial of this cause, introduce evidence for the purpose of locating his title papers and the boundaries thereof, the same as if he had sued out, and proceeded to have a warrant of survey executed in due form of law. But the court, (ARCHER, C. J.,) refused to sustain said motion, and instructed the jury, that said patents, deeds, will, and possession, were competent evidence in this cause, for the purpose of showing title in the plaintiff to the lands in the declaration mentioned. To which refusal and instruction of the court, the defendant excepted.

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2ND. EXCEPTION. After the evidence contained in the foregoing bill of exceptions (made part thereof,) had been given, the defendant, to support the issue on his part, gave evidence tending to show, that there was water at all times before this suit, flowing on the land claimed by plaintiff, in its accustomed channel, sufficient for plaintiffs use; and the diversion of said stream of water by defendant, was partial, and in no way injured the plaintiff, but benefitted his lands, by preventing the accumulation of water in the low grounds, through which the said stream flowed; and that said diversion took place at a point above plaintiffs lands; and further proved, that such was the situation of that part of plaintiffs lands through which said stream flowed; that the said stream could not be used for the purpose of working machinery on said land, as it had no fall on said land. The defendant then offered to prove, by parol evidence, that long previous to this suit, and before the diversion of the water, as aforesaid, it was agreed, verbally, between plaintiff and defendant, that the defendant might divert the said stream in the manner now complained of, for the purpose of working a mill about to be erected by defendant on his lands, if he, the defendant, would allow plaintiff the use of a certain way or road leading from plaintiffs lands over and through defendants. And that in pursuance of said agreement, the plaintiff was allowed the use of said way or road, and did use the same; and the defendant went on, at great expense (upwards of \$4000,) and labor, with the knowledge of the plaintiff, and without any objection on his part, but was encouraged by him, to erect and complete his mill as before agreed; and while the same was in operation to supply the same with the stream aforesaid, as agreed, without which the mill could not be used; and that no objection was made by plaintiff to defendant's diverting said stream as aforesaid, until after the completion of said mill, and shortly before bringing this suit; and further offered evidence to show, that in case said stream is withdrawn from defendants mill, and wholly restored to its ancient channel, the defendants mill would be rendered useless and of no value; and that before this suit,

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and soon after the completion of said mill, the plaintiff demanded a large pecuniary compensation from defendant, for the further use of said stream as aforesaid, or, that said dam should be abated. That the foregoing facts were offered, to show, that said parol agreement or license, was made by the plaintiff, with a view to entrap the defendant into the erection of the said mill and dam, upon the faith of the said contract and license, and with a design, when the same should be completed, fraudulently to use them as a means of extorting from the defendant, by threatening to deprive him of the use of the water for his mill, unless he would pay what he, the plaintiff, should demand from him. But, upon the objection of the plaintiff's counsel, the court, (ARCHER, C. J.,) refused to permit the above facts to go to the jury for the purpose aforesaid. The defendant excepted, &c.

The verdict and judgment being against the defendant, he appealed to this court.

The cause was argued before DORSEY, CHAMBERS, and SPENCE, J.

By ADDISON for the appellant, and

By RICHARDSON, dep. att. gen., for the appellee.

DORSEY, J., delivered the opinion of this court.

The only question, discussed by the appellant's counsel, and on which the opinion of this court was called for, on the first bill of exceptions was, whether, as the plaintiff had not located the patents and title papers of his land upon plots returned to the court, under a warrant of re-survey issued for that purpose, he could give such patents and title papers in evidence to the jury, and prove, that the grievance complained of, was perpetrated by the defendant in respect of those lands.

In an action relating to lands, if the defendant does not see fit to take defence on warrant, the plaintiff is under no obligation to ask for a warrant to locate his land, or any of the matters in controversy between the parties. Without such plots he may read his title papers in evidence to the jury; prove his

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possessions under them, and show by oral or other testimony the injury he complains of; and for which he seeks indemnity.

The case of *Medley vs. Williams, et al., Lessee*, the only case relied on by the appellant as sustaining his position, bears no resemblance to the case now before us. There, defence was taken on warrant, and locations made, and this court held that a title paper, of which there was no location, could not properly be offered in evidence; on the well established principle of correspondence between the pleadings and the proof. But here, no warrant of survey being required by either plaintiff or defendant, no plots or locations could be made in the cause. The county court, therefore, are exempt from the error complained of in the first bill of exceptions.

But the county court, we think, erred in rejecting the testimony offered by the appellant in his second bill of exceptions. The plaintiff having offered the testimony stated in the first bill of exceptions, showing the diversion of the stream from its natural channel, on his land, where it was accustomed to flow; the defendant offered evidence to show, that the diversion of the water complained of, was made on the lands of the defendant, above the lands of the plaintiff, and, that it was rather a benefit than an injury to his lands; and that it was made in virtue of a verbal agreement, entered into by the plaintiff and defendant; by which, it was agreed, that the defendant might make the diversion, as now complained of, for the purpose of working a mill, to be erected by the defendant on his own land; if he, the defendant, would allow the plaintiff the use of a wagon road, from the lands of the plaintiff, over the lands of the defendant. That, in pursuance of the agreement, the plaintiff used the said road; and the defendant, at an expense of upwards of \$4000, (encouraged so to do by the plaintiff,) erected the said mill; which mill was of no value, without the said privilege of diverting the water, as aforesaid. That the plaintiff made no objection to the diverting of the stream of water, till shortly after the completion of the mill; when the plaintiff demanded of the defendant a large pecuniary compensation for the use of the water; and that the dam, erected on

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the defendant's land for the diversion of the same, should be abated; and, that the aforesaid conduct of the plaintiff was fraudulently designed, for the purpose of extorting money from the defendant. Upon the objection of the plaintiff's counsel, the court refused to permit the foregoing facts to go to the jury: and in so doing, we think, the county court were clearly in error. If admissible for any purpose, the court was not authorized in rejecting the testimony. In mitigation of damages it was surely admissible; but it was admissible, as evidence, upon other grounds, and for other purposes. For even conceding, what we by no means admit to be true, that the aforementioned agreement did not confer on the defendant a privilege or license, to divert and use the water which the plaintiff could not, at pleasure, countermand; yet, as the defendant had done no act towards diverting the water from its accustomed flow, over the lands of the plaintiff, since the countermand, he could not, by such countermand, be rendered a wrong doer, *ab initio*; or be made responsible in damages for acts done upon his own land, and with the express permission and authority of the plaintiff himself. If ever the maxim, "*volenti non fit injuria*," was applicable to any case, it must be conclusive on this.

But, regarding this license as countermandable, upon what terms is the plaintiff to be restored to his former rights? Can he require of the defendant to be at the expense, and endure the labor, of removing structures lawfully erected, and by the express authority of the plaintiff? The manifest injustice of such a requisition, is an answer to the question. How, then, is the plaintiff to be restored to rights which he is authorised to demand? By doing justice to the defendants: by tendering to him the expense which he has incurred, under the license. This principle was announced in the case of *Winter vs. Brockwell*, 8 East, 308. Where an action being brought for a private nuisance, by the erection of a sky-light over the defendant's open area; at the trial, the defence set up was, that the area, which belonged to the defendant's house, had been enclosed and covered by a sky-light, in the manner stated, with

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the express consent and approbation of the plaintiff, obtained before the enclosure was made; who, also, gave leave to have part of the frame work nailed against his wall. But, sometime after it was finished, the plaintiff objected to it; and gave notice to have it removed. But *Lord Ellenborough* “was of opinion, that the license given by the plaintiff to erect the skylight, having been acted upon by the defendant, and the expense incurred, could not be recalled, and the defendant made a wrong-doer: at least, not without putting him in the same situation as before, by offering to pay all the expense which had been incurred in consequence of it; and, under this direction, the defendant obtained a verdict.” In this case in *East*, there was no consideration given for the license; and the nuisance, by which the plaintiff suffered from the acts done under it, was a serious one; and yet, *Lord Ellenborough* subsequently, on a motion for a new trial, after stating that he had looked into the books on the point, reiterates the doctrine that he had before laid down, except as to tender of expense to be made to the defendant; and states, that in one of the cases to which he refers, “*Haughton J.* lays down the rule, that a license executed is not countermandable; but only when it is executory.”

The testimony offered by the appellant in the case before us, is not only admissible, but is, if believed by the jury, a conclusive bar to the right of action of the appellee. Such was the decision in the case, (almost identical with the present,) of *Liggins vs. Inge*, 7 *Bingham*, 682, reported in 20 *Eng. C. L. Rep.* 290; and to that effect are the cases above referred to by *Lord Ellenborough*. And *Kezick vs. Kern*, 14 *Serg. & Rawls*, 267. The opinion now given, is not, as was urged in the argument for the appellee, in conflict with the decision of this court, in the case of *Hays vs. Richardson*, 1 *Gill & Johns*. 366. There the right, claimed under an instrument of writing, not acknowledged and recorded, agreeably to the registry laws of the State, was a right of way over the lands of the person intending to grant it, and was an use, thereof, to the extent of the right asserted; and came within the very terms of the act of Assembly for the enrolling of conveyances, viz: that “no

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manors, lands, tenements, or hereditaments whatever, within this province, shall pass, alter, or change from one to another, whereby the estate of inheritance or freehold, or any estate for above seven years, shall be made or take effect in any person or persons, or any use thereof to be made, &c.," unless the conveyance be executed, acknowledged, and recorded, in the manner therein prescribed. But, in the case before us, the appellee passed to the appellant no estate or interest in his land, or any use thereof. He simply agreed to abandon the use of the water, in the manner in which it had been accustomed to flow on his land. And the moment the abandonment was consummated by the execution of the license, the right of the appellee to the use of the water, as it formerly flowed in its natural channel, became extinct; it was no longer appurtenant to his land; and he, thenceforth, held it as if no such privilege or appurtenance had ever belonged to it. And this view of the subject, in no wise, contravenes the prominent object of our enrolment laws, the protection of purchasers. When a purchaser views the land he desires to acquire, he sees it divested of its water right, and contracts for it accordingly: so that no injustice is done him.

We are not to be understood in what we have said, as countenancing the idea, that a written grant, unacknowledged and unenrolled, of a power similar to that conferred by the license in this case, but which power had not been executed, would be operative and effectual to bar a subsequent *bona fide* purchaser, for a valuable consideration without notice, claiming the water right naturally incident to the lands he had purchased. To interpose such a bar, in such a case, we think the same conformity to the provisions of our *registry laws* is necessary, that would be required if land were the subject of the conveyance.

The doctrine, insisted on in the argument of the counsel for the appellant, that an oral contract, of no validity under the statute of frauds, would obtain such validity, and would enable a party to maintain an action upon it at law, if he could prove that the opposite party perpetrated, or designed to per-

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petrate, a fraud, when he entered into the contract. A replication, charging such fraud to the defendant, in an action at law, instituted on such a contract, would be no answer to the defendant's plea of the statute of frauds. If a party on whom such a fraud has been committed, has relief any where, it must be sought in a court of equity; at law it cannot be obtained.

Assenting to the opinion of the court, on the first bill of exceptions, but, dissenting from its refusal to admit, in evidence, the testimony offered by the appellant in the second bill of exceptions, we reverse its judgment.

JUDGMENT REVERSED AND PROCEDENDO ORDERED.

CHAMBERS, J., dissented in part.

I concur in the opinion expressed by my Brother *Dorsey*, so far as that opinion relates to the case, now for the judgment of this court. To so much of it as relates to the idea, "that a written grant, unacknowledged and unenrolled, of a power similar to that conferred by the license, in this case, &c." I beg leave to be considered as expressing, neither concurrence or dissent. That question is not involved in the cause now before us, has not been at all argued by counsel, certainly has not been investigated by me; and, whatever be the law applicable to it, this case will, in no respects, be affected by it.

Considering it quite sufficient to examine and decide questions which are brought before us, I am unwilling to prejudge others; not because of any supposed difficulty in the particular case, but on account of the principle.

SARAH E. MITCHELL, *vs.* ELIZABETH A. MITCHELL, EXECUTRIX OF JAMES D. MITCHELL.—*December*, 1844.

On the 6th August 1837, *J.* by his last will, devised his sister *S.* an annuity, to be paid by his executrix, and charged the same on the whole of his real estate. After a devise of a farm to his wife, for her life, he bequeathed the same "unto the eldest male heir of the body of his brother *H.*, and the heirs and assigns of such male heir, if he shall live to attain the age of twenty-

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one years;" and for want of such male heir, then the same estate should descend to the right heirs of the testator. The testator died in 1837; left no children, but a widow, (the devisee for life,) who died in 1841, a sister *S.*, of the whole blood, and his brother *H.*, of the half blood, *still alive*, who has a son, his eldest male child, born in 1838. HELD: that upon the death of the tenant for life, in 1841, living *H.*, the estate descended to the right heirs of the testator, his sister *S.*, the complainant in the bill.

Where an estate, charged with the payment of a legacy, descends to the legatee, the lien becomes extinct, by the union of the title, and the charge, in the same person.

One may be heir apparent, or heir presumptive, but not *very* heir, living the ancestor; no one is recognized as heir, until the death of his ancestor.

One cannot take, as *purchaser*, under the description of *heir*, or *heir male*; unless, when the estate is to vest, he has, by the death of his ancestor, become *very* heir.

This is the general rule, subject only to this exception, that when the intention of the testator can be made clearly to appear from the will, that he did not mean the words, *heir* or *heir male*, to be used in their technical sense, then the popular sense shall prevail.

Prima facie, the word *heir* must be taken in its technical sense, as a word of limitation.

Every contingent remainder must vest *eo instanti*, that the particular estate determines.

There are certain principles to be kept in view, when a court is called upon to construe a will: one is, and the most material, that the leaning should be towards technical words in their technical sense; and only suffering themselves to adopt another meaning, when there can be no reasonable doubt, from the context, that in such sense the testator used them; and that he could not have used them in their known and legal sense.

APPEAL from the Court of Chancery.

The bill, in this cause, was filed on the 16th February 1838, by the appellant, praying subpœna against *Elizabeth Mitchell*, claiming a discovery and account of the rents, and profits, and proceeds, of certain real and personal property, devised by *Francis J. Mitchell*, father of the complainant, and *James D. Mitchell*, testator of said *Elizabeth A.*, to *James D. Mitchell*, in trust for *Sarah E. Mitchell*, and for an annuity under the will of *James D. Mitchell*. An amendment, made *Henry S. Mitchell* and his infant son, *Joseph H. Mitchell*, parties defendants.

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The questions of law decided, arise under the following clauses of *James D. Mitchell's* will, dated 6th August 1837, viz:

“I give and bequeath to my dear sister, *Sarah Elizabeth Mitchell*, an annuity of \$500, to be payable and paid to her by my executrix, hereinafter named, in even and equal semi-annual instalments, for and during the whole term of the natural life of my said sister, accounting from the time of my decease; and I charge the whole of my real estate with the payment of the said annuity, in manner aforesaid.

I give and devise to my said wife, *Elizabeth Ann Mitchell*, my farm and real estate, situated in *Charles* county, called “*Myrtle Grove*,” containing eighteen hundred acres, or thereabouts, be the same more or less. And likewise, my farm in *Kent* county, &c.; and all the slaves at “*Myrtle Grove*,” and the live stock, farming and plantation utensils, and implements of husbandry, on said farm, respectively being; and also my lot of land, situated, &c.; and generally, all the rest, residuc, and remainder of my estate, real, personal, and mixed, not hereinbefore disposed of, wherever situate or being, inclusive of my library, books of accounts, &c. To hold said farms, lot of land, and real estate, and all said slaves, &c., unto my said wife, for and during the term of her natural life, without impeachment of waste.

It is, nevertheless, my will and desire, in case the debts owing to me and which may be collected, should fall short of an amount sufficient to discharge the just claims against me, that my said wife sell and dispose of, in her best discretion, so much of my personal property, other than that given and bequeathed to her in perpetuity, as may be necessary to make up that deficiency; but, if the moneys on hand at the time of my death, and those owing to me, and which may be collected, should exceed the amount of the just claims against me, then I give the surplus or difference to my said wife, to be applied to her own use. Moreover, I authorize and empower my said wife, if she shall think proper so to do, to sell such of my slaves as may not be necessary, for cultivating and carrying on

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the "*Myrtle Grove*" farm, and domestic purposes thereon, and in the event of such sale, to apply the proceeds to her own use, or to dispose thereof, as to her may seem fit.

After the decease of my said wife, I give and devise my aforesaid farm, called "*Myrtle Grove*," and the slaves that may remain undisposed of; inclusive of the future issue and increase of the females; and also, the farming and plantation utensils and implements of husbandry, and live stock, that may be then remaining on that farm, unto the eldest male heir of the body of my brother, *Henry S. Mitchell*, and the heirs and assigns of such male heir forever, if he shall live to attain the age of twenty-one years, or leave lawful issue; and in case of the decease of such eldest male heir of the body of my said brother, in his minority, and without leaving lawful issue, then to the next eldest male heir, of the body of my said brother, and the heirs and assigns of such next eldest forever, if he shall live to attain the aforesaid age of twenty-one years, or leave lawful issue; and so on in succession, to the third, fourth, and other male heir, his heirs and assigns, if any such male heir there shall be, that may live to attain the aforesaid age of twenty-one years: and for want of such male heir of my said brother, then the same estate shall descend to, and devolve upon the right heirs of me, the said *James Davidson Mitchell*, in fee simple.

And as to my aforesaid farm, called "*Hunting Fields*," and the live stock, farming utensils, and implements of husbandry thereon; and also, my aforesaid lot of land, in the city of *Baltimore*, I give and devise the same, after the decease of my wife, to such one or more of the children of my aforesaid brother, *Henry S. Mitchell*, as my dear wife, by her last will and testament, or by any instrument of writing, in the nature of, or purporting to be, a last will and testament, executed in the presence of, and attested by two or more credible witnesses, shall name and appoint; to have and to be entitled thereto, and his, her, or their heirs and assigns forever; and in default of such nomination and appointment, then to all the children of my said brother, whether already or to be hereafter born,

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equally, their heirs and assigns forever. But if there be no such child, or descendant of a child, who shall live to attain the age of twenty-one years, then the said last described estate and property, shall descend to, and devolve upon the right heirs of me, the said *James Davidson Mitchell*, to be held by them, their heirs and assigns, forever. I authorize the leasing, for a long term, renewable for ever, any part or parts, or the whole of my aforesaid lot of land, in the city of *Baltimore*, for the best rents that can, at the time of making the lease or leases thereof, be obtained for the same; said lease or leases to be executed by my wife, at any time or times during her life; she may fix the rents, and reserve the same to her own use, for her life; and after her decease, to the use of the person or persons, who may, under this, my will, be entitled thereto. I wish it to be understood, that the person or persons, who may, according to the terms of this, my will, be entitled to the slaves, live stock, and moveable chattels aforesaid, after the decease of my wife, is, or are to receive and take the same, in the condition in which the property may be found at the time of my wife's decease; it being my will and intention, that my said wife, if she shall deem it necessary, may dispose of by sale, in her life time, any part or parts of the moveable chattels aforesaid, except the slaves so as aforesaid, necessary for the "*Myrtle Grove*" farm, and the proceeds apply towards her comfortable maintenance and support."

The facts connected with the will of *J. D. M.*, are stated in the opinion of this court.

After the filing of the bill, answers and proofs, the chancellor, (BLAND,) at March term 1843, decreed, that the bill should be dismissed, upon the grounds imputed to him in the opinion of the appellate court, and from which the complainant appealed.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and SPENCE, J.

By ROBERT J. BRENT and REVERDY JOHNSON, for the appellants, who cited.

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1 *Saun. Uses*, 363, *Willis on Trus.* 124. 3 *Dessau. C. R.* 346, 388. *Ward on Leg.* 190. 1 *Ves. Jr.* 557. *Stallman on Elect.* 231. 3 *Bro. Parl. Cases*, 155. 7 *Gill & John.* 217. 1 *Sumner*, 1. 1 *Ves. Jr.* 97. 10 *G. & J.* 174. 7 *G. & J.* 248. *Fearne on Con. Rem.* 210. 4 *Kent. Com.* 253. 2 *Day*, 28. 6 *Cruise, Dig.* 38. 9 *Wheat.* 325. 1 *Mason*, 224, 6 *Harr. & John.* 374. 1 *Dyer*, 99. 1 *P. Wil.* 232. 22 *Law Lib.* 425. 21 *Law Lib.* 316. 2 *Dessau.* 94. 3 *Wood Lec.*, 202. 1 *W. Black*, 1010.

WILLIAM SCHLEY, for appellee, cited.

24 *Law Lib.* 52. 23 *Law Lib.* 25. *Llewin on Trusts*, 102, 629, 630, note 639. *Ward. on Leg.* 143, 192. 3 *Bro. C. R.* 88. 1 *Ves. J.* 176. 3 *Atk.* 616. 1 *Eden*, 489. *Ambler*, 657, 7 *G. & J.* 220. 1 *Peters. S. C.* 236. 1 *Swan.* 359, note 381. 1 *Fonb.* 153. 15 *Wendell*, 290. 9 *Clark & Fin.* 583, 606.

ARCHER, J., delivered the opinion of this court.

The bill, as amended, seeks to enforce payment of a legacy left the complainant, by the last will and testament of *Francis J. Mitchell*, by the obtainment of a decree for the sale of *Myrtle Grove*, upon the ground, that the said legacy was, by the said last will and testament of *Francis J. Mitchell*, charged upon the said estate.

The bill, also, seeks an account of all the property left to *James D. Mitchell*, by the will of *Francis J. Mitchell*, in trust for the complainant.

The chancellor dismissed the complainant's bill, first, because the estate charged with the alleged legacy, had descended to the complainant; and secondly, because it did not sufficiently appear, that the personal estate bequeathed to *James D. Mitchell*, in trust, for the complainant, ever was managed by, and applied to his own use, by the said *James D. Mitchell*, without the consent of the complainant.

The only estate alleged in the argument of complainant, to be charged with the legacy, by the will of *Francis J. Mitchell*,

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is the estate called *Myrtle Grove*. If that estate has, in fact, descended to the complainant, the charge, if one in point of law exists, has become extinct by the union of the title and the lien in the complainant.

We will, therefore, first proceed to enquire whether the estate called *Myrtle Grove*, has descended to the complainant.

This question grows out of the will of *James D. Mitchell*, bearing date on the 6th day of August 1837. *James D. Mitchell* died in the month of August 1837, and probate was had of his will, on the 23rd of August 1837. *James D. Mitchell* left no children, but a widow, *Elizabeth A. Mitchell* since deceased, and a brother, *Henry S. Mitchell*; a brother by the same father, but a different mother; and a sister, the complainant, of the whole blood. *Henry S. Mitchell*, has a son now living, named *Joseph H. Mitchell*, who is his oldest male child, and was born in March 1838. *Henry S. Mitchell* has also another son, an infant, now living. *Elizabeth Ann Mitchell*, the widow of *James D. Mitchell*, died in the month of August 1841.

The life estate devised by the will to *Elizabeth Ann Mitchell*, having terminated, the half brother of the complainant still living, the question is, whether the remainder to the eldest male heir of *Henry*, is vested in his oldest male child? or whether, in consequence of the life estates terminating before the death of *Henry*, the remainder to his oldest male heir is not void? in which event the estate would descend to his heirs: The complainant is the heir at law of the testator.

The terms used in the will, as descriptive of the remainder, are, "the first heir male of his brother *Henry*, and the heirs and assigns of such male heir forever, if he shall live to attain the age of 21, or leave lawful issue, &c." The cases which have been cited establish the law to be, that no one is recognized as heir until the death of the ancestor. In the language of *Mr. Justice Taunton*, a man may be heir apparent, or heir presumptive, but he is not very heir living the ancestor. One cannot, therefore, take as a purchaser under the description of *heir*, or heir male, unless, where the estate is to vest, he has, by

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the death of his ancestor, become *very heir*. This appears to be a general rule, subject only to this exception, that when the intention of the testator can be made clearly to appear from the will, that he did not mean the word heir, or heir male, to be used in its technical sense, but in its popular sense, then the popular sense shall prevail. The intention should be by demonstration plain; and he who urges the exception, must demonstrate the intention, for *prima facie*, the words must be taken in their technical sense, as words of limitation. These principles will be found to be sustained by *Hob.* 33, 1 *Vent.* 334, 2 *Vent.* 311, 1 *P. Wil.* 229, 2 *Wil. Black.* 1010, 2 *Leon.* 70, 4 *Mod.* 153. And it is rightly said, by one of the judges, in delivering the opinion of the court, in *Winter vs. Perratt*, 9 *Clarke & Finnely Ap. Ca.* 669, “that what amounts to a plain demonstration of intention, so as to withdraw the term *heir* from its technical interpretation, must, in each case depend on the language used, and the circumstances under which it is used; and is not a question to be determined by reference to reported cases; but by a careful consideration of that language, and those circumstances, in the particular case under discussion.”

We perceive no room to doubt, that the term “*heir*” was designed to be used by the testator in its technical sense; wherever in the will the word heir is used, it is used in its technical sense, as where he says the first “*heir male of Henry*” and “*his heirs and assigns.*” In the latter instance, the word *heirs* is used by the testator in its technical sense; and again, on the failure of heirs male of *Henry*, who were to take in succession, then he devises over, to his *right heirs*. Can we, by any just construction, impute to the testator a different meaning to the same words, when used in the same will, and in the same sentence of the will, without any thing to indicate a difference? But again, when the testator devises *Hunting Field* to his wife, and gives her a power of appointment, and in case of her failure to exercise that power of appointment, devises the estate to the children of *Henry*; is it not still more apparent, that he was aware of the difference in the terms, heir of *Henry*, and child of *Henry*?

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The annuity to the heirs at law, which has been bequeathed, with a charge on his lands, by the testator, and his presumed knowledge, that his sister, his heir at law, had designs to connect herself with a *monastery*, we do not think furnish considerations showing a different intent from the technical sense. The charge is on all his lands, as well *Hunting Field* as *Myrtle Grove*; and yet, in such case, on the failure of the contingency, the devise over is to the heir at law.

The case of 9 *Cla. & Fin., Ap. Ca.* 606, has been cited as decisive of this. It is true, in that case, the terms used by the testator were considered as indicating an intention, in the use of words, different from their legal signification; but the judges who so decide, do so on the ground, that the term, *heir male of the branch of R. C's family*, in connection with the circumstances of the case, and the fact that *R. C's* family was known to the testator, gave to the word *heir male*, a different signification from its technical meaning. Though even in this case, different as it is from the one before the court, much diversity of opinion prevailed among the judges; and it strikes us, from a review of their opinions, there would have been but little difference of opinion, had the mere technical terms been used, without the qualifications affixed to them.

In conclusion, on this branch of the case, we beg leave to refer to the following observations of *Lord Brougham*, in delivering his opinion in the case above adverted to, "that there are certain principles fit to be kept in view, when we are called upon to construe a will, which raises such doubts as the present has raised. One is, and the most material, that the leaning should be towards taking technical words in their technical sense; and only suffering ourselves to adopt another meaning, when there can be no reasonable doubt from the context, that, in such sense, the testator used them; and that, he could not have used them in their known or legal sense. This rule is founded on the consideration of the risk we run, in allowing a scope for conjecture and fancy, of making a will for him, which neither he himself made, nor the law recognized; and if it be said that, by adhering to the technical sense, we shall

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sometimes run the risk of giving a construction which the testator did not intend, the answer is, that this risk is common to both courses, and we avoid that other, and perhaps greater evil, of introducing uncertainty into the foundation upon which titles rest :” In these views, we fully concur.

If the word, *heir male*, is to be construed in its technical sense, then the limitation over, after the death of the tenant for life, is gone ; as there could be no heir of *Henry Mitchell*, during his life. The rule being, that every contingent remainder must vest, *eo instanti*, that the particular estate determines.

The remainder failing to take effect, the estate descended on the death of the tenant for life on the complainant, who was heir at law, and her lien was sunk in her title to the land.

The principal cases which determine, that if there be sufficient in the will to show that the word heir, is used in such a way that the testator meant the word “*heir*,” to mean, *descendant*, or heir apparent, it shall be so construed, are, 1 *Ven.* 334, 2 *Vent.* 311, 1 *Pier. Wil.* 229, 2 *W. Black.* 1010. The first of these cases is *Burchett vs. Durdant*. There, a devise to the heirs of the body of *A.*, now living, was held to be a vested remainder, and it was so determined, because the words “*now living*,” were referred, not to *A.*, but to the heirs of the body; and it was apparent, from other parts of the will, that the testator knew that *A.* was in *esse* also. It was, on this account, adjudged, that the heirs of *A.*, took the remainder to the heirs of *A.*, during his life. As there was an heir apparent of the body of *A.*, then living, it was considered as a *designatio personæ*.

The case of *Darbison vs. Beaumont*, 1 *P. Wil.* 229, was a devise of lands to *A.* for life, remainder to his first son, in tail male, &c., and in default of such issue, remainder to the heirs male of the body of the testator’s aunt, *Elizabeth Long*, lawfully begotten ; and for default of such issue, remainder of all his lands, to his, the testator’s right heirs. He also gave a legacy to *Elizabeth Long*, and legacy to her three sons, *A.*, *B.* and *C.*, of £500. The question was, whether the heir at law of the testator, or *A.*, the eldest son of *E. L.*,

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was entitled to the testator's real estate. Three reasons are assigned for the judgment, that the heir at law did not take the estate. 1st. That the testator noticed, that the sons of *E. Long* were living; and that she, *E. L.*, was also living. 2nd. That the limitation of the right heirs of the testator was expressly, on failure of *issue* male of *E. L.*; so that the intent was plain, that the apparent heir of the body of *E. L.*, should take before his heir general; and 3rd. That it was the same as *Burchett vs. Durdant*, because, the words, then begotten, connected with the word, heirs male, were nearly similar. The words, then begotten, in this, were tantamount to "*then living*," in the former case.

It is very certain, that the case before us does not come within the reason of either of the above cases. There is no devise to an *heir male* of *H. W.*, *then living*, as in *Burchett vs. Durdant*; for here at the death of the testator, *H. W.* had no issue born. The will, here, does not leave over the estate to the heirs at law, upon *the failure of issue*, as in the case of *Darbison vs. Beaumont*; but the expression is, on failure of *such heir male*, to the the heirs at law; nor are the words *heirs of the body of H. M. begotten*, found in this will; and if they had been, these words in the case before us, could not be understood to be tantamount to *heirs then living*, because, *H. M.* had no children *then living*. The case in 2 *Will. Black.* 1010, has been supposed to go further than either of the cases above adverted to. Here, the devise was to his son, *Richard Brooking*, and the heirs of his daughter, *Margaret*, jointly and equally, and for want of heirs male of *Richard Brooking*, at his decease, then to *the heirs and assigns of Margaret, lawfully begotten of her body*. The testator knew, that *Margaret* was living, and had at his death a son. In *Darbison vs. Beaumont*, the words, heirs male, of the body of the testator's aunt, *Elizabeth Long, lawfully begotten*, were considered tantamount to, *heirs of the body then living*, and as being the same in principle with the case of *Burchett vs. Durdant*. The case, therefore, of 2 *W. Black.* 1010, may be governed by one of the reasons, assigned for the judgment in *Darbison vs. Beaumont*.

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We do not consider the case before us, as one, in which the testator has given plain indications of an intention, that the technical words he has used should be taken in their popular sense, and to mean descendants; and do not, therefore believe, that the cases above adverted to, can govern and control our construction of the will, now under consideration.

The above views render it unnecessary for us to enquire into the various questions, which in relation to this lien, were discussed, as growing out of the will of *F. J. Mitchell*.

In relation to the right of the complainant to an account, in reference to the property devised in trust to *James D. Mitchell*, for the use of the complainant under the will of *Francis J. Mitchell*, we concur with the chancellor in his views, as expressed in his decree in this case, and affirm his decree.

DECREE AFFIRMED.

BARNES COMPTON, vs. WILSON COMPTON.—December, 1844.

It is the duty of the *Orphans court* in appointing a guardian, to consult the interest, rather than the wishes of an infant.

An appeal will not lie from an order of the *Orphans court*, appointing a guardian.

APPEAL from the *Orphans Court* of *Charles County*.

On the 5th March 1844, the appellant, a minor, appeared in the *Orphans court* and prayed to have a guardian appointed, and asked to have *Richard Barnes, esq*, one of the justices of the said court, to be appointed, who retired from the bench. The court postponed the appointment until the 3rd Tuesday in March, when, on the 19th of that month, the appellee filed a petition, alleging the condition of the appellant's property, the necessity of a guardian, and institution of legal proceedings to protect the minor's property and vindicate his rights. The petitioner alleged, that he was the nearest male relation of the minor, and ought to be appointed. The appellant answered

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this petition, and reiterated his wish to have his relation, *Richard Barnes*, appointed. On the 23rd March, the court decreed that *Wilson Compton* be appointed guardian, on giving bond; from which decree *Barnes Compton* prayed an appeal, by his next friend, *Richard Barnes*, to this court.

The cause was submitted on notes of counsel, to ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MAGRUDER, J.

By T. F. BOWIE for the appellant :

The appellant contends that he has the *right to select* his own guardian, and that his selection is to be admitted by the *Orphans* court, unless good cause be shewn that he has made an improper or injudicious selection. In this case, it is not pretended that *Richard Barnes* is not, in all respects, a fit and proper person to be guardian to the minor. No objection, whatever, was urged against his appointment, on the ground of unfitness, on the contrary, if the statements made in the minor's petition to the *Orphans* court are to be taken as true, and they are not at all controverted, he was, and is, of all persons, the most fitting.

The appellee insists, in his petition, that being the nearest male relation to the minor, he is to *be preferred* as his guardian, and the court below, in granting his petition in the manner they do, adopt his views of the law, and in effect decide, that he is to be preferred, and by reason of such preference, *entitled* to the guardianship. These views of the law are deemed to be altogether erroneous, and an examination of the authorities, both in *England* and in this country, will prove them to be so.

It has been supposed, that the time at which a minor has the right to choose his guardian is, at the age of *fourteen*, and not sooner; but this will be found to be the case only with reference to those kinds of guardianships in *England*, where, by the law of *England*, the right of guardianship belongs, as *a matter of right*, to certain descriptions of persons, until that age is attained by the minor; as in the cases of guardianship

in *chivalry* ; in *socage* ; by the custom of *gavel kind* ; by the custom of the *manor*, and the like. In all these cases, the right of selection does not exist *before fourteen*, simply because, by law, the right of guardianship devolves by operation of law, as a matter of right, and to allow the minor the right of choice in such cases *before fourteen*, would conflict with the rights of other persons secured to them by law, and the immemorial usages of the realm. In the case of the guardianship in *socage*, which exists in all cases where minors have lands held by the *socage tenure*, the next male heir who cannot by possibility inherit the estate, is entitled to the guardianship until the minor attains the age of *fourteen*, at which time the guardianship ceases, and the right of selection begins. In such a case the guardian derives his right, not from appointment by any of the courts of *England*, but by the usages of the common law, and is entitled to enter into and take possession of the minor's lands and estate, and to keep the same until he attains to the age of fourteen. So also, with reference to the guardianship in *chivalry*, which exists only where minors are entitled to lands held by "*military or knight service*." In this case, the lord who originally granted the lands and of whom they are so held, is entitled to the guardianship of the minor, and to possession of all such land, until the minor attains to an age at which he is able to perform "*military services*." In this case also, the right of choice in the minor before that age, does not exist, because it would conflict with the feudal rights of the lord, which are secured to him by the immemorial customs of the common law ; and so in reference to all the other descriptions of guardianships before spoken of. Wherever the estates of the minor are holden by any of the feudal *tenures* or *customs* of the realm, the right of selection in the minor does not exist before the age of fourteen years ; but it is confidently believed, that in *all other* cases, where the minor's estates are not held by any of the ancient *feudal tenures*, the right of selecting his own guardian exists at any age, that he is capable of making a *prudent selection*. See *Coke on Littleton*, 786. 14 *Law Library*, 69. *Coke on Littleton*, by Thomas, 183, note 6. 1 *Chitty Blac. Com.* 462, note 9.

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In the ecclesiastical courts of *England*, a minor above *seven years of age* has the right to choose his guardian, and he is admitted in that character by the court, who hold themselves bound by the minor's nomination, unless an improper choice is made, and in that case, and that case only, they will control it. 40 *Law Library*, 68, 69. *McPherson on Infants*, 74, 75. This is the undoubted law of England.

The feudal tenures were abolished in this country by the Revolution, and there are now in this State no such tenures as draw with them any of the kinds of guardianships above spoken of, which devolve, by operation of law, on those who are entitled. But all guardianships in this State are created by appointment, and such as are in *England*, now granted by the ecclesiastical and chancery courts, in which the right of selection has uniformly been acknowledged to exist in the minor, if above seven, and capable of making a proper choice.

This was undoubtedly the case in this State, and the right of selection seems to have been engrafted upon our laws by the legislature of the State. By the act of 1715, chap. 39, sec. 7, *Bacon's Laws of Md.*, the right of choice is given to the minor in express words, "if capable of choosing his guardian," and is denied to him only in the event of his not being of sufficient age to make a proper choice. No particular age is mentioned by the act alluded to. The minor's capacity to make a prudent and judicious choice, seems only to have been considered as sufficient to give him the right. And it is submitted, that this important right is no where impaired or taken away by any subsequent legislation of the State. It is clearly not taken away by any *express words* of repeal in any subsequent act of Assembly. The act of 1798, chap. 101, which it is supposed, repeals the act of 1715, by sec. 2, repeals only so much of all former acts "as are inconsistent with, or repugnant to any of its provision." So far from repealing this part of the act of 1715, the act of 1798 seems to recognise the right of choice in the minor. For by sub. chap. 12, sec. 2, the *Orphans* courts are authorised "to call or have brought before them, any orphan for the purpose of appointing a guardian."

Why have them brought into court to have a guardian appointed, if they are not to be consulted in reference to the appointment? This provision seems to imply the right of choice, and the uniform and invariable practice in all the *Orphans* courts through the State has been, from their organization to the present day, to allow the right of choice precisely in the same manner, as was allowed by the judge or commissary general for probate of wills, &c., under the act of 1715, sec. 7. They have never construed the act of 1798 as repealing the act of 1715, in this particular; and in the case of *Kraft, vs. Wickey*, argued in this court as late as 1832, 4 *Gill & John*. 339, the counsel in the cause seem to have recognised the act of 1715, sec. 7, as still in force in this State, so far as relates to this right of selection of guardians by minors. So important a privilege as this is, to the *infant* citizens of this republic, ought not to be taken away from them by mere construction or implication. There ought to be express words of repeal, before the courts should permit so serious an invasion of the rights of infants. It is confidently submitted, that no such express words of repeal can be found in any subsequent statute of the State, and it is difficult to discover any principle of law which would require the courts, ever watchful as they are over the rights and interests of minors, to deny to them this inestimable privilege.

The right to choose guardians *before the age of fourteen*, and whenever they are capable of making prudent selections, being thus established to be in all orphans, how far the *Orphans* courts are bound by their selection, when made? will be the next subject of inquiry. To say that the *Orphans courts* have an unlimited discretion in the matter, will be in effect to deny the right of selection in the minor, for of what avail or benefit will it be, if the *Orphans courts* in the exercise of a wild and arbitrary discretion, have the right to over-rule their choice whenever they may think proper. The act of 1798 sub. chap. 12, sec. 1, gives to the *Orphans courts* the power to appoint guardians to all orphans in this State, entitled to any real or personal estate, but this act does not prescribe the rules which

are to govern the *Orphans courts* in the exercise of that power. They are simply substituted by the act of 1798, in the place of the commissary general, who originally had that power, under the act of 1715, leaving the principles and rules of law by which they are to be governed in the exercise of the power, precisely where they were prior to the passage of the act of 1798. And what were those principles? The authorities already cited shew what they were, and the extent to which the right of selection has been recognised in the minor. It is only where the minor makes an improvident choice, or selects some person manifestly unsuited and unfit for the station, that the *Orphans courts* can control it.

This restricted discretion is allowed to the *Orphans courts*, from regard to the interests of minors, and with a view to protect them in the enjoyment of the right itself. They are bound by the selection, if it does not appear to be imprudent; and those who seek to set aside the selection made, must prove or shew it to be imprudent, or in some way injurious to the minor. The same rule on this subject will prevail here, that prevails in the ecclesiastical courts of *England*. "The minor may himself nominate his guardian, who is then admitted in that character by the judge, but if the minor makes an improper choice, the court will control it." 41 *Law Library*, 69. *McPherson on Infants*, 75. If without any proof of unfitness in the person selected, or any pretext that he has been injudiciously selected, the *Orphans court* disregards the right of choice in the minor, it would be manifest error and the exercise of an arbitrary and unreasonable discretion, which the law never designed to confide to it.

In the case at bar, no pretext of that sort is alleged, nor does it appear that any objection of that character was made to the person who was selected by the minor as his guardian. It is exceedingly difficult, therefore, to ascertain any excusable ground for the action of the *Orphans court* in this case, and still more difficult to apply any principles either of law or equity, which would justify the order passed by them, by which they have so unceremoniously impaired the infant's right of choosing his own guardian.

By the act of 1820, commonly known as the act to direct descents, the right of election to take the lands of an intestate, at their valuation, is secured to the eldest heir. This right of election is declared to be a valuable *privilege* by this court in the case of *Chaney, vs. Tipton*, 11 *Gill & John*. 253; and if invaded or withheld by any action of an inferior court, would be such a wrong as may be redressed by the appellate court.

Can it be doubted, that the right of an infant to select his own guardian, is of equal value and concern to him as the right of election, under the act of 1820, is to the persons to whom it is given? and if in the one case, an invasion of the right would be redressed on appeal, it is difficult to see on what grounds similar redress would be denied in the other. Whenever a matter is *purely within the discretion of the Orphans courts*, as in the case of the granting of letters of administration in certain cases, it is admitted, that no appeal will lie to reverse their action; but this is, simply, because in such cases no rights are impaired, or wrongs inflicted. The *Orphans courts* having the unlimited discretion in such cases, are not responsible for the exercise of it, and the courts will not intend, that they have done wrong to any one who has a *right* to complain.

But the question now under review is very different from that in the case supposed. The right of a minor to select his guardian, is a positive right secured to him by law, and not a mere matter of appointment, within the discretion of the *Orphans courts*. If they have discretion at all, it is restricted in its nature, and dependent entirely on the existence of peculiar circumstances, which must be shewn to exist in fact, before the discretion, as a rule of action, arises at all. If the circumstances do not exist, on which depend the right of discretion, then no discretion exists at all; and if in such a case, a court acts upon such discretion, thus assumed by them, where it was not intended to be given, their action would be erroneous, and a clear case of usurpation of power. In all such cases it is well settled, that an appeal will lie to reverse such erroneous exercises of judicial power.

Compton vs. Compton.—1844.

THOS. S. ALEXANDER, and P. W. CRAIN, for appellee.

The question presented by this record is, whether an infant of *thirteen* years of age, has a right to appoint his own guardian? Or whether such appointment rests in the discretion of the *Orphans* court? If the infant of such age may claim the right of selection, then the decree in this case must be reversed. If, on the other side, the *Orphans* court possesses the power of appointment simply, or may control the exercise of the right of selection, by an infant, (assuming such right to exist,) in either case the decree must be affirmed.

By the act of 1798, ch. 101, sub. ch. 12, sec. 1, (which it is apprehended gives the law to the case,) it is enacted, that whenever land shall descend, or be devised to a male, under the age of twenty-one years, &c., &c., and said male, &c., shall not have a natural guardian, or guardian appointed by last will, &c., &c., the *Orphans* court, &c., shall have power to appoint a guardian to such infant, until the age of twenty-one years, if a male, &c., &c.

The power of appointment is thus given over all male infants, who at the time of its exercise, may be under the age of twenty-one years, *simply, absolutely*; without *restraint*, or *qualification*, or *exception*. The power is given to the court, to be exercised as its judicial discretion may dictate; and for the due exercise of such discretion, it is responsible. It may not devolve its power on another, nor permit its discretion to be controlled by the caprice of the infant. Confining our attention to the law itself, it is very clear, that no distinction is made between infants above, and those under the age of thirteen years; and if the power of the court may be controlled by the nomination or selection, made by an infant of twenty years, then there is no legal reason, wherefore, the same control should not be exercised by an infant of twenty months.

It is true, that by sec. 2, "the court shall have power to call, or have brought before them, any orphan as aforesaid, for the purpose of appointing a guardian." This power is *potential* merely, and we know, that in practice, many guardians are appointed in the absence of their wards. In some cases, the

court calls the infant before it, in order that the infant may be handed over to the custody of the guardian. In other cases, it is exercised with a view of consulting the infant's reasonable inclinations. But whatever may be the considerations upon which the enactment rests, and whether the authority is deemed *potential* or *imperative*, it is very clear, that it extends equally to infants of all ages. And if under pretexts of his right, to appear before the court, at the time a guardian is to be appointed for him, an infant of fourteen years, or thirteen years, may claim the privilege of naming the person who shall be appointed, then may the like privilege be claimed and exercised by an infant of any age whatever.

On the part of the appellant, it is attempted to control the preceding enactment, by interpolating therein the rights, which it is supposed an infant might have exercised by the common law. It is admitted, that at common law, an infant owning lands in socage tenure, might have selected his own guardian, after the expiration of his guardianship by tenure. But this admission does not assist the appellant, since the guardianship in socage, continued until the infant attained his full age of fourteen years. The ecclesiastical courts are likewise in the habit of appointing guardians, under certain circumstances; but, their power to appoint a guardian, except for any committed purposes, is denied, and it would seem, that in those courts, the power of selecting his own guardian, is given to any infant, who is above the age of *seven* years. If we are to derive authority to our *Orphans courts*, from the practice of the ecclesiastical courts, we must take that practice as we find it. But this is not contended for, and it is by no means certain, that the literal admission of the right of an infant, to select his own guardian, is not accompanied by the practical exercise of the power, to guide that selection, as the court itself deems expedient. Just as a chapter, in the election of a bishop, find their responsibilities alleviated by the intimation, which accompanies the *conge delire*; that the crown will be gratified by their choice, of a particular individual. In my opinion, safer precedents may be derived, from the provisions of the statute

of 12 *Car.* 2, ch. 24; and the practice of the Court of Chancery, which to supply the defects of the common law, has been compelled to exercise the power, of appointing guardians to the persons and estates of infants. The father and the court exercise their powers, irrespective of the inclinations of the infant, and in every case, the appointment continues until the ward attains his age of twenty-one years. For all this, I refer to *McPherson on Infants*, (41 *Law Library*,) the authority referred to by the counsel, for the appellant.

He next refers to the act of 1715, ch. 39, sec. 7, which gives the power of selection to an infant, who is capable of choosing his guardian, and hence argues, that there is an age, after which the discretion of the court ceases. The act also says, that *if the infant be not at age*, the court shall appoint. It is clear then, that the rule intended to be established, was not a rule which was to depend on the actual discretion of the infant; but discretion was to be imputed or denied, as a legal conclusion from his age. And the right is more definite, and better secured, if it is made to depend on age, than it could be, if made to rest on actual discretion. Who is to judge of the infant's actual discretion? The court, and the coincidence, or otherwise, of the infant's selection with the court's preference, would be the conclusive evidence of the capacity of the infant. What then was the age, which determined the court's discretion? The act of 1763, ch. 24, sec. 2, which, extending the court's power to some cases, not covered by the act of 1715, empowers the court to permit the infant, if above the age of fourteen years, to choose his guardian, and if *under the age of fourteen years*, then the court is to appoint. Now, treating these acts as parts of one system, the age of fourteen years, is *the age* referred to generally, by the act of 1715, and the infant's capacity is determined by his age. I care not then, whether these acts shall form a part of our statutory law, or are repealed as inconsistent with the provisions of the act of 1798. I incline to think, their enactments are entirely inconsistent with the broad and unlimited discretion, which is given to the *Orphans courts*, by the act of 1798;

and infer from the diversity in those provisions, an intent on the part of the legislature, to withdraw from the infant the anomalous power of appointing the guardian, who is to check and control him at the very age, when experiences teaches us, a youth is the least controllable. If we can notice the origin of the act of 1798, we may fairly infer, from the character of its author, an intent to substitute a power, concurrent and co-extensive with that of the Court of Chancery, to appoint as guardian the person whom the court may deem best fitted, to exercise all the functions pertaining to the office of guardian. In crediting this concurrence of jurisdiction, the most mischievous consequences would result, if it was understood, that if taken before the court of chancery, the infant would have to acquiesce in the appointment, to be made by the court; whilst he was at liberty, by going before the *Orphans* court, of selecting a guardian for himself. I refer to the *North Carolina Reports*, Hayw. 350, 303, *Mills vs. McAllister*; and especially to the note at the end of the case, for the purpose of showing, that the court may and should exercise, without restraint, its power of appointment.

If the court possessed the power of appointment, then its action in this case is conclusive. A variety of cases are to be found, in which it has been adjudged, that the appellate court will not attempt to control the court of the first instance, in the exercise of powers confided to its discretion, and surely no subject can be suggested, in regard to which, it is more important, that the court having personal intercourse with the infant, and the competitors for the care of his person and property, should be the ultimate judges of their relative merits.

Admit this court to have a control over the discretion of the *Orphans* court, to set aside its judgment, when such judgment is shown to have been predicated upon improper or clearly insufficient grounds, is there any thing on the face of this record to show, that the court's discretion was not rightly exercised? The facts on which the court acted; the grounds of their decision, are not stated. The infant's petition alone is relied on, as evidence of the qualifications of the person nomi-

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nated by him. But, the averments in that petition, are not in themselves evidence, nor are they sustained by proof. Were it otherwise, the statements made by the infant may well stand with other facts, which, if disclosed, would show the entire unfitness of his nominee; neither the influence which he has acquired over the infant, nor his literary attainments, lead to the conclusion, that his moral qualities are such as we should require in the guardian of a youth; and it is by no means improbable, that the proceedings, which are contemplated by the appellee, were designed for the assertion of some right of property of the infant, against the person, whose influence over the infant, has occasioned this controversy. I am not at liberty to state the particulars which have been communicated to me; but I am instructed, and may so say in general, that the court below, acted on grounds very satisfactory to itself; and to request, in justice to that court, nay, more especially for the welfare of the infant, that the decree may not be reversed, and the guardianship of the infant changed, without affording us an opportunity of showing the grounds on which the appellee was preferred. In the present state of the record, every presumption is to be made in favor of the decree. There is nothing on the face of the record, to convict them of improper, immature judgment. If the power of the court over the subject, is conceded, then must it be assumed, that it has rightly acted, 3 G. & Johns. 39, *Owens vs. Collinson*; and I apprehend this consequence will follow, whether it is supposed the court possessed the power of appointment simply, or possessed a power of controlling an injudicious choice, on the part of the infant. If the right of the infant to select, is subject to any control, then ought we to assume, it was properly controlled in this instance, 1 Coxe, 397, *Eldridge vs. Lippincott*, here conceded, that the mother was *prima facie* entitled to the guardianship. Yet, the court having appointed another, without assigning reasons therefor, the Court of Appeals presumed there were adequate reasons for setting her aside. Admit with us, that the right of the infant, when improperly exercised, may be controlled, and we may very confidently rely on the above

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case as an authority, in point, in our favor. Will its application be avoided by asserting, that our youth, when by the exuberance of their passions they are most likely to be led astray, shall have the absolute and uncontrolled power of selecting their guardians and advisers? I know that the power existed, without any legal control, at the common law. The same may be predicated of our acts of 1715 and 1763; and hence, I conclude very confidently, that our legislature of 1798, designed to abrogate a rule which cannot be observed, without entailing upon our sons and daughters the most evil consequences.

Nothing, be it observed, is said against the fitness of the appellee. He is the nearest of kin to the infant, the surviving administrator of the estate of the infant's father. If his personal qualifications are admitted, there is propriety in selecting, as guardian, the person who is already possessed of the infant's estate. The infant's subsistence is most surely provided for; and all rights of the infant against him, as guardian and administrator, are saved, until the infant attains his majority. These are important considerations.

MAGRUDER, J., delivered the opinion of this court.

This appeal must be dismissed: from an order of the *Orphans* court, appointing a guardian to an infant, no appeal will lie.

It is the duty of the *Orphans* court, in appointing his guardian, to consult the interests, rather than the wishes of the infant. If the latter was competent, without control, to choose his guardian, it would be scarcely necessary for him to have one. He might also choose his own boarding-house, his instructors, and others whose services he needed. The *Orphans* court, in the discharge of this duty, may make an injudicious choice; but it is not probable that this court, without any information to assist them, could exercise such a power more judiciously.

From such an order, it would not be more proper for this court to entertain an appeal, than from an order of the county court, granting, or refusing to grant, a new trial.

APPEAL DISMISSED.

Burgess vs. Pue.—1844.

THOMAS BURGESS, COLLECTOR OF PRIMARY SCHOOL DISTRICT, No. 30, OF HOWARD DISTRICT, vs. ARTHUR PUE, JR.—*December 1844.*

In an action of *replevin*, brought by a taxable inhabitant against a collector of the school tax, to recover property seized for non-payment of such tax, due for 1843, having filed his affidavit on which he obtained the writ, affirming that the property had been taken by such collector, he cannot maintain that the school district is disorganized, and the power of the taxables suspended by reason of informalities in the proceedings of such district, for the year 1842.

Nor that the election for 1843 was void, because the minutes of the proceedings of the taxables did not state every thing to have been done, which the law requires to be done; as, that the election should be by ballot. It is not necessary that the mode of election should appear on the minutes, nor that they should show the clerk had bonded.

The taxables when assembled, may vote a tax, as well for the expenses for the current year, as to pay arrearages due for essential expenses of the preceding year.

Notice of the time and place of meeting of the inhabitants, to authorise the imposition of a school tax under the act of 1825, should be given.

In such an action, the collector need not offer proof of his qualification. He is an officer *de facto*, and in the absence of proof, no presumption is to be made against his qualification.

The act of 1825, does not forbid the appointment of one of the trustees to be the clerk of the school district.

The legislature had the right to delegate, to those appointed to exercise them, viz: the taxable inhabitants, the powers given by the act of 1825, ch.

The individuals to whom those powers were delegated, ought to conform to the provisions of the law under which they act; but the minutes of their proceedings need not show all the facts necessary to give them jurisdiction. Governed by the nature of the trust conferred, and the great confidence reposed, by the law, in the judgment of such inhabitants, the court will presume any thing which the law requires to be done, to be rightly done, until the contrary appears.

Upon a case stated, which does not authorise the court to give judgment for either party, this court can give no judgment, but must reverse that of the court below, and remand the cause.

In the case of corporations, the recording of an official bond is not essential to its validity, unless it be so expressly declared.

A vote or resolution, appointing an agent for a corporation, need not be entered on the minutes, but may be inferred from the fact of accepting his services, or permitting him to act.

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Persons acting publicly as officers of a corporation, are presumed to be right-fully in office.

An election by a corporation, contrary to its charter, is voidable; yet if an officer has come in under color of right, and not in open contempt of all rights whatever, he is an officer *de facto*.

APPEAL from *Howard District Court*.

This was an action of *replevin*, commenced by the appellee against the appellant, on the 4th September 1843, founded on the following warrant, viz :

“To *John L. Moore*, clerk of *Howard District of A. A. co. Howard District of Anne Arundel county*, to wit :

Whereas, on this 4th of September 1843, before me the subscriber, one of the justices of the peace of the State of *Maryland*, in and for the said district, *Arthur Pue, jr.*, of the said district, made oath, that two pied oxen belonging to him have been illegally and unjustly seized in execution for school taxes, for district No. 30, by the collector, *Thomas Burgess*, which affidavit is hereto annexed : Whereby it appears to me, that it is necessary for the purposes of justice, that a *replevin* should issue ; you are hereby empowered and directed to issue a *replevin* for the following chattels taken as aforesaid, to wit, “two pied oxen,” and this shall be your warrant for the same. Witness my hand and seal this 4th day of September, 1843.

JAMES A. FROST. (Seal.)”

“*Howard District of Anne Arundel county*, to wit : Be it remembered, that on this 4th day of September 1843, before me the subscriber, one of the justices of the peace of the State of *Maryland*, in and for the said district, personally appeared *Arthur Pue, jr.*, of the said district, and made oath on the Holy Evangely of Almighty God, that two pied oxen have been illegally and unjustly seized by the collector, *Thomas Burgess*, for the school taxes for primary school district No. 30, of said district.

Sworn before

JAMES A. FROST. (Seal.)”

Replevin bond was filed and approved. The writ of *replevin* issued, and the oxen were replevied and delivered to the plaintiff below, who filed his declaration for the same.

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The defendant pleaded

1. *Non cepit*.

2. An avowry, in which he alleged, that the said place where the taking of the goods and chattels, aforesaid, is supposed to be, is within the limits of primary school district No. 30, of *Howard District* of *Anne Arundel* county, and that at a meeting of the taxable inhabitants of said primary school district, duly convened and held in said district on the 29th day of July 1843, it was among other things voted, that a tax of sixteen cents on every hundred dollars worth of assessable property in said district be raised, to defray the expenses of the school in said district, and the said defendant was then and there duly elected and appointed collector of said district, and to collect the aforesaid tax; and the said defendant accepted said office, and duly qualified as such collector, as aforesaid; and received from the trustees of said primary school district, duly appointed and qualified as such, a rate bill made by the said trustees, and containing the names of the persons chargeable with the aforesaid tax, with the sums respectively payable by them agreeably to law, and a warrant in due form of law, requiring the said defendant, as collector as aforesaid, to collect the sums chargeable against, and payable by said persons respectively, according to law. And because the said plaintiff was chargeable with the sum of \$37.49½, part of the tax aforesaid, so as aforesaid voted and assessed, and because the said plaintiff utterly refused to pay the aforesaid sum of money or any part thereof, unto the said defendant, as collector as aforesaid, within the time limited by law for that purpose, or at any time prior to the aforesaid taking, although payment thereof of the said plaintiff, was by the said defendant, as collector as aforesaid, in due form of law demanded, that is to say, on the day and year aforesaid, at the county aforesaid; the said defendant well avows the taking of the said goods and chattels in said place, where, &c., and justly, &c., for the said sum of \$37.49½, so being in arrears and collectable by the said defendant, as collector as aforesaid, which to the distress of said defendant, as collector as aforesaid, was charged

and bound, and this he is ready to verify. Wherefore, he prays judgment and a return, &c.

The plaintiff joined issue on the 1st plea, and replied to the avowry.

1st. That the said defendant, at the said time when, &c., was not the collector of primary school district, No. 30, duly elected, qualified and authorised to collect the taxes imposed in said district, in manner and form as the said defendant hath above, in his said avowry in that behalf alleged; and this, &c.

2nd. That the meeting of the taxable inhabitants of said primary school district, held on the 29th July 1843, by which the tax mentioned in the said avowry is avowed to have been made, was not duly convened and held in said district, and was not authorised to impose and vote said tax; and this, &c.

3rd. That the taxable inhabitants of said primary school district, No. 30, were, on the 15th July 1843, notified to meet on the 29th July, (at the school house in said district,) of said year, for the purpose of electing officers, and voting a tax for the support of the school for the ensuing year, and the said taxable inhabitants, on the said 29th July, at the said school house, in said meeting, voted a tax to defray the necessary expenses of the district, during the past and for the current year, which tax is the same in the said avowry mentioned; and this, &c.

4th. That the tax voted by the said meeting of the taxable inhabitants of school district, No. 30, in said avowry mentioned, was not voted at an annual meeting of the taxables of said district, duly convened and held, and this the said plaintiff is ready to verify; wherefore he prays judgment, &c.

5th. That on the 29th July 1843, there was no legally organised school district meeting, authorised and empowered to vote a tax on the inhabitants of said district, and this the said plaintiff prays may be enquired of by the country, &c.

6th. That at a meeting of the taxables of the said supposed school district, No. 30, held on the 30th July 1842, a tax of eight cents in the hundred dollars of assessable property in

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said district, was voted for the expenses of said school district for the ensuing year, and a rate bill or tax list made out and placed in the hands of the defendant, with a warrant thereto annexed, commanding him to collect of the said plaintiff the sum of \$18.74 $\frac{3}{4}$, among others of the taxable inhabitants of said district, by virtue of which proceedings and warrant, the said defendant seized and took the property of the said plaintiff, in payment of the said sum of \$18.74 $\frac{3}{4}$; whereupon the said plaintiff sued out of *Howard District* court of *Anne Arundel* county, a writ of replevin against the said defendant, on which writ such proceedings were afterwards had in said court, that a judgment thereon was given for the plaintiff, as will appear from the record of said court, and the said plaintiff in fact saith, that the tax imposed by said meeting of the taxable inhabitants of said supposed school district, No. 30, at the meeting of the 29th of July 1843, was voted to defray the expenses of the past and for the current year; and the said plaintiff further in fact saith, the said defendant hath appealed from the judgment of *Howard District* court, in the action between the said plaintiff and the said defendant, on the writ of replevin, sued out by the plaintiff as aforesaid, which appeal is still pending and undecided, and this the said defendant is ready to verify; wherefore he prays judgment, &c.

7th. That the sum voted as a tax, at the meeting of the taxables of the said supposed school district, No. 30, held on 29th July 1843, was not raised in due proportion on all the taxable inhabitants of said district, and this he is ready to verify; wherefore he prays judgment, &c.

It was then agreed, by the parties, that this cause be submitted to the court here, on the following statement of facts:

It is agreed and admitted, that a meeting purporting and claiming to be an annual meeting of the taxable inhabitants of primary school district, No. 30, in *Howard District*, held on the 29th July 1843, at the primary school house in said district, pursuant to notice, by *George L. Stockett*, (who assumed to act as, and during the then preceding year had publicly acted as the clerk of the district,) set up at the school house,

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and other, the most public places in the district, for the space of time required by law, a tax of sixteen cents on every one hundred dollars of assessable property in the district, was imposed and laid to defray the necessary expenses of the district, during the past and for the current year; that *George L. Stockett*, *George Ellicott* and *Isaac P. Ijams*, were elected trustees of said district for the ensuing year, and the defendant was elected collector thereof, and the said collector gave bond with security, for the performance of his duties as collector, as appears from the copy of the minutes of the book of proceedings of said district hereto annexed, marked A, as a part of this statement, (which copy it is agreed, shall be taken and received as full proof of the entries therein, as if the original was before the court duly proved,) and which is in the following words, to wit:

“A copy of the proceedings of primary school, No. 30, of *Howard District* of *A. A.* county.

PRIMARY SCHOOL.—Notice is hereby given, that the annual meeting of the free white male citizens of the State of *Maryland*, above the age of twenty-one years, and actual residents of, and taxable in school district, No. 30, of *Howard District* of *A. A.* county, will be held at the school house in said district on Saturday, the 29th day of July next, at 10 o'clock, A. M., for the purpose of electing officers and voting a tax on the assessable property of the district, for the support of the school for the ensuing year.

July 15th, 1843.

GEO. L. STOCKETT, Clerk.”

“29th July 1843. At a public meeting of the taxable inhabitants of primary school district, No. 30, in *Howard District* of *A. A.* county, convened according to public notice, given by handbills placed at the following places, to wit, one at *Lilly's* tavern, one at *Ilchester* mills, one at *Mrs. Williams'* tavern, one at school house, No. 30, and one published in the *Howard District Press*. The meeting was then organized by calling *George Ellicott* to the chair, and appointing *McLane Brown*, secretary. The trustees laid before the meeting a communication from the counsel engaged to defend the suits brought

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against *Thomas Burgess*, collector; and after considering the same, the following resolutions were adopted:

1st. Resolved, that *Thomas Burgess*, collector, be instructed to suspend all further proceedings in the collection of the tax imposed by the resolutions of the meeting held on the 30th July 1842.

2nd. Resolved, that a tax of sixteen cents on the one hundred dollars of assessable property, in the district, be imposed on said property, to defray the necessary expenses of the district, during the past and for the current year.

3rd. Resolved, that every taxable inhabitant, who shall have paid the sum assessed to him by the resolution passed on 30th July 1842, shall be entitled to retain the sum so paid by him out of the tax, which he may be liable to pay under the above resolutions.

The above three resolutions were unanimously adopted, the people voting by ballot. On motion, *George L. Stockett* read the trustees' report. On motion of *Reuben P. Hammond*, the trustees' report was unanimously adopted. On motion of *McLane Brown*, *George L. Wight* and *Levy Chaney* were appointed to count the ballots, when it appeared there were thirteen votes in favor of the report and none against it. On motion, *Mr. Hammond*, *George L. Stockett*, *George Ellicott*, and *Isaac P. Ijams*, were put in nomination for trustees for the ensuing year. On motion of *Mr. Brown*, the meeting then proceeded to ballot. On motion, *Mr. Ijams*, *George L. Wight* and *Levy Chaney* were appointed to count the ballots, when it appeared thirteen ballots were deposited, and that there were thirteen votes for *George L. Stockett*, thirteen votes for *George Ellicott*, and thirteen votes for *Isaac P. Ijams*, one member of the meeting refusing to vote. *George Ellicott*, *George L. Stockett* and *Isaac P. Ijams*, were therefore declared duly elected trustees for the ensuing year. On motion of *Mr. Stockett*, the meeting proceeded to ballot for clerk, *McLane Brown* being in nomination. On motion of *Mr. J. P. Ijams*, *George L. Wight* and *Levy Chaney* were appointed to count the ballots, when it appeared *Mr. Brown* was unanimously elected.

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On motion of *Mr. Stockett*, the meeting proceeded to ballot for collector, *Thomas Burgess* being in nomination; on motion of *J. P. Ijams*, *George L. Wight* and *Levy Chaney* were appointed to count the ballots, when it appeared that *Thomas Burgess* had thirteen votes, being the whole number of votes cast, and he was declared unanimously elected. On motion of *Mr. Ijams*, the minutes of the meeting was read by the secretary. On motion of *Mr. Stockett*, the meeting was then adjourned to the 29th July 1844, and the proceedings signed by the chairman and secretary.

(Signed,) GEORGE ELLICOTT, *Chairman*.

McLANE BROWN, *Sec'y.*"

"Annual report of the trustees of primary school, No. 30, of *Howard District* of *A. A.* county.

The trustees of primary school, No. 30, report, that at the last annual meeting of the resident taxable inhabitants, held on the 30th July 1842, we were elected trustees for the ensuing year, and at the same time, a levy of eight cents on the one hundred dollars of taxable property in the school district, was voted for the support of the school; that it was estimated \$160, but only \$22 has been collected and received. We have received from the school commissioners of *Howard District* \$90, and from the State fund \$55.25, from the monthly payments of the children attending school \$36—in all about \$203.25. We have paid for teacher's salary \$182.62, for books, stationary and stove, \$43.21, but there is now due for stationary and teacher's salary about \$65, which is estimated in the expenses for the ensuing year. Circumstances having occurred, not necessary here to mention, makes it necessary that a levy of 16 cents on the \$100 of taxable property in the school district, be made to meet the expenses of the school for the past and ensuing year, this we estimate to be about \$560. We estimate the levy of 16 cents, will produce about \$390; the monthly payments of the children about \$25, and from the State fund and commissioners of the district about \$145, which we think will be sufficient to defray the necessary expenses of the school for the ensuing

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year, and meet its liabilities for the past year. All of which is respectfully submitted.

(Signed,)

GEORGE ELLICOTT,

GEO. L. STOCKETT,

J. P. IJAMS,

Trustees."

"Copy of clerk's bond.

Know all men by these presents, that we, *McLane Brown* and *Edward Brown*, of *Howard District of A. A. county*, are held and firmly bound unto the State of *Maryland*, in the just and full sum of \$300, current money, to be paid to the said State of *Maryland*, or its certain attorney, to which payment well and truly to be made, we bind ourselves and every of us, our heirs, executors and administrators, jointly, severally and firmly by these presents, sealed with our seals, and dated this 31st day of July, in the year 1843. Now whereas, the above bound *McLane Brown* has been duly appointed clerk of primary school district, No. 30, of *Howard District of Anne Arundel county*.

The condition of the above obligation is such, that if the said *McLane Brown* shall well and faithfully execute the office of clerk, as aforesaid, according to law, then this obligation to be void and of no effect, otherwise to remain in full force and virtue in law. (Signed,)

McLANE BROWN, (Seal.)

EDWARD BROWN. (Seal.)

Signed, sealed and delivered in presence of

MARSHALL D. MAXWELL."

"A copy of tax list for 1843, at 16 cts. on the \$100. *McLane Brown*, \$2,146, \$3.43½, and forty-two other taxables.

"Received 1st August 1843, of the trustees of primary school, No. 30, *Howard District*, a copy of the above tax list for collection, which is to be returned collected, within sixty days.

(Signed,)

THOMAS BURGESS."

"A copy of collector's bond.

Know all men by these presents, that we, *Thomas Burgess* and *Washington Gaither*, of *Howard District of Anne Arundel county*, are held and firmly bound unto the State of *Maryland*, in the full and just sum of \$384, current money, to be paid to

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the said State, or its certain attorney or assigns, to which payment well and truly to be made, we bind ourselves and every of us, our and every of our heirs, executors and administrators, jointly and severally, and firmly by these presents, sealed with our seals and dated this 1st day of August, in the year of our Lord 1843: whereas, the above bound *Thomas Burgess* has been duly appointed collector of primary school district, No. 30, in *Howard District of Anne Arundel* county; now the condition of the above bond is such, that if the said *Thomas Burgess* shall well and faithfully execute the office of collector, as aforesaid, according to law, this obligation to be void, otherwise to be and remain in full force and virtue.

(Signed,) THOMAS BURGESS, (Seal.)

WASHINGTON GAITHER, (Seal.)

Signed, sealed and delivered in the presence of

McLANE BROWN.

A true copy from the school book, McLANE BROWN, Clerk.”

Which bond of said collector was accepted and approved by the said trustees who had accepted their appointment, and were acting as trustees as aforesaid, and that the said trustees so acting as such, made out a rate bill or tax list, for raising the aforesaid tax on all the assessable property in the district, and in due proportion; but the said plaintiff alleges, that the resolutions annexed thereto, qualify said rate bill and render said proportion unequal, delivered the same with their warrant, requiring him to collect the aforesaid sums from the persons charged therewith, with the resolutions adopted at said meeting, from No. 1 to No. 3 inclusive, annexed to said rate bill and warrant.

It is further agreed, that the copy of the proceedings of the said primary school meeting, and of the bond of the defendant, as collector aforesaid, and rate bill and warrant aforesaid, attached to and made a part of this statement, may be read by the plaintiff, for the purpose of shewing, (if he can,) any irregularity or defect in the proceedings of said meeting, or in the appointment or qualifications of the said trustees or collector, which will in law, negative the authority of said trustees

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or collector to act as such, and the admissions herein previously made, are to be taken, subject to this limitation. It is further admitted, that in the year 1832, a primary school was organized in said district, and ever since has been kept up in fact; but the regularity and legality of such organization and continuance is denied by the plaintiff, and affirmed by the defendant. It is admitted, that the trustees and clerk elected on the 30th July 1842, at the meeting of the taxables of said school district (claiming and professing to be the annual meeting duly convened, but which claim is denied by the plaintiff,) of that year, were elected *viva voce*, and not by ballot, the plaintiff being present and voting, and no objection having been made to said proceeding, and that the said trustees and clerk continued to act as such until the 29th July 1843, and that no district meeting of the taxables of said district was formed or organised by the commissioners of primary schools, in the interval or up to the time of the commencement of this suit, and no trustees, clerk, or collector, were appointed by the commissioners of primary schools, for school district No. 30, since the said school first went into operation. It is further admitted and agreed, that the record of proceedings in the action of replevin between the present parties, tried and determined in this court at March term, 1843, and now depending in the Court of Appeals, shall be taken as part of this statement, and that any fact therein admitted, shall be admitted herein, and the plaintiff is allowed to rely on the papers in said cause, and the minutes of proceedings hereto annexed, marked B., as follows, to wit: the 9th annual meeting of primary school, in district No. 30, *A. A.* county. 29th July, 1839, minutes of the 9th annual meeting of the taxable inhabitants in district No. 30, *A. A.* county. On motion of *McLane Brown*, *George L. Stockett* was called to the chair; and on motion of *Anthony Smith*, *McLane Brown* appointed secretary *pro. tem.* On motion of *McLane Brown*, the report of the trustees was read by *George L. Stockett*, and on motion of *McLane Brown*, the report was unanimously adopted. On motion, the treasurer's report was read and adopted. On mo-

tion of *McLane Brown*, the meeting proceeded to the election of officers for the ensuing year, when *Mr. Brown* nominated *A. Smith*, *George L. Stockett* and *J. P. Ijams*, as trustees for the ensuing year; the aforesaid gentlemen were unanimously elected trustees for the ensuing year; and on motion, *McLane Brown* was elected clerk for the ensuing year; and on motion of *McLane Brown*, *Anthony Smith* was duly elected collector. On motion of *Mr. Smith*, the meeting adjourned to the last Saturday of July 1840.

The 10th annual meeting of P. S., in district No. 30, *A. A.* county, 1st August 1840. Minutes and proceedings of the 10th annual meeting of the taxable inhabitants in district No. 30, *A. A.* county. On motion of *J. S. Williams*, *Dr. R. G. Stockett* was called to the chair, and *J. S. Williams* appointed secretary. On motion, it was resolved, under the laws regulating primary schools of *A. A.* county, this meeting deem it incompatible for the trustees of primary schools, to hold at the same time the office of commissioner or inspector of primary schools. On motion, it was resolved, that when the number of scholars in this school district amount to thirty, that the trustees be requested not to admit any scholars from any neighbouring district. On motion, it was resolved, that nine cents on the \$100 be levied on this district, for the ensuing year. On motion, *Anthony Smith*, *J. P. Ijams*, and *George L. Stockett*, were elected trustees, and *George L. Stockett* to act as secretary, *pro. tem.* On motion, it was resolved, that the annual meeting be held on the last Saturday in July, hereafter, at 10 o'clock, A. M. On motion, the meeting adjourned, *sine die.*

GEO. L. STOCKETT, Clerk, *pro. tem.*”

“July 31st, 1841. The 11th annual meeting of taxable inhabitants of primary school district, No. 30, *Howard District* of *A. A.* county. On motion of *George L. Stockett*, *Thomas Maccree* was called to the chair, and *George L. Stockett* appointed as clerk. On motion, it was resolved, that a tax of eight cents on the \$100 be levied on the taxable property of — district, for the ensuing year. On motion of *Thomas Maccree*, *George L. Stockett*, *J. P. Ijams* and *George L. Wight*, were

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appointed trustees for the ensuing year. On motion of *George L. Wight*, it was resolved, that the report of the trustees be adopted. On motion of *J. P. Ijams*, it was resolved, that this meeting do adjourn to the last Saturday of July 1842, at 10 o'clock, A. M.

July 30th, 1842. The 12th annual meeting of the taxable inhabitants of primary school district, No. 30, *Howard District* of *A. A.* county convened, and on motion, *George Ellicott* was called to the chair, and *McLane Brown* appointed secretary. On motion, the secretary read the trustees annual report; *Mr. Ijams* moved the adoption of said report, determined in the affirmative; *McLane Brown* moved a levy of eight cents in the \$100; *C. S. W. Dorsey* moved, as a substitute, four cents, determined in the negative. The vote was then taken on *McLane Brown's* motion, and determined in the affirmative. *Mr. Wight* nominated *George L. Stockett*, *J. P. Ijams* and *George Ellicott*, as trustees for the ensuing year; *Henry H. Pue* nominated *Levi Chaney*, *Anthony Smith* and *William Smith*; the question was then taken on the nomination of *George L. Stockett*, unanimously elected; *J. P. Ijams* and *George Ellicott*, unanimously elected; *Mr. Ijams* nominated *George L. Stockett* as clerk, elected unanimously. On motion of *C. S. W. Dorsey*, resolved, that the trustees report to the next annual meeting the number and names of the children attending school, and who pay capitation tax, and the time of their attendance. On motion of *A. Smith*, the meeting adjourned, to meet on the last Saturday of July 1843, at 10 o'clock, A. M.

(Signed,) GEO. ELLICOTT, *Chairman*.

McLANE BROWN, *Sec'y.*"

And all other proceedings in the minutes of the proceedings of said school district, to be read from the minute book, for the purpose of showing a defect or want of legal authority in the meeting of taxables of 29th July 1843, to impose said tax, and in the defendant as collector, or for any other cause; the defendant denying, however, the right of the plaintiff to rely on any part of said proceedings of any meeting anterior to the 29th July 1843, for any such purpose. It is further admitted,

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that the plaintiff is, and on the 29th day of July 1843, was, a taxable inhabitant of said primary school district, and charged as such with the tax imposed, as aforesaid; that payment thereof being refused, the said defendant seized the property in the proceedings mentioned, these being the property of the plaintiff, and within the aforesaid district, and held the same for payment of said tax, but no objection, whatever, is to be taken to the regularity of the proceedings of the defendant, provided he was legally and duly authorised to demand payment, as aforesaid. It is further admitted and agreed, that the minutes of proceedings of school district No. 30, marked B. shall be received as legal evidence of the facts therein stated, as if the original book was duly proved; upon the foregoing statement of facts and such inferences thereupon as a jury might fairly draw, it is submitted, whether said defendant had lawful authority as collector, as aforesaid, to take the property of the plaintiff, aforesaid; the case is submitted to the court, with liberty to either party to appeal.

RICH'D. I. BOWIE, for plaintiff.

THOS. S. ALEXANDER, for defendant.

The plaintiff then insisted, that the act, entitled, an act to provide for the public instruction of youth in primary schools throughout the State, and the several supplements thereto, are unconstitutional and void.

2nd. That the tax laid at the meeting of the taxables of primary school district, No. 30, of *Howard District*, held on the 29th July 1843, was illegal and void; because the trustees, clerk, and other officers, elected at the preceding annual meeting of the 30th July 1842, were not elected by ballot, but *viva voce*, and the clerk did not bond, whereby the said district meeting was disorganised, and the powers of the taxables suspended; and the annual meeting of the 29th July 1843, was called without due authority of law, the commissioners of primary schools being the proper persons to re-organise said district meetings.

3rd. That the notice declared the object of the meeting to be "for the purpose of electing officers and voting a tax," &c.

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“for the support of the school *for the ensuing year* ;” the tax laid was to defray the expenses of the district during the past, and for the current year.

4th. That the tax is retrospective, and not prospective, is not within the purview of the acts, but for purposes not prescribed by them.

5th. That the tax was not laid at the annual meeting of the taxables of the district.

6th. That two taxes have been laid in the same year for the same purpose.

7th. That the sum voted as a tax, was not raised in due proportion on all the taxable property in said district.

8th. That the property of the plaintiff has been before seized and taken for a part of the sum now demanded of him as a tax, and for which his property is now seized, and a suit is now pending in the Court of Appeals, involving the validity of the tax first laid.

9th. That the said taking was illegal and wrongful, because the said defendant had not duly qualified as collector of said tax, according to law.

10th. That the person assuming to act as clerk, was ineligible, having previously been elected trustee, and acted as such ; he could not act in both capacities, and the proceedings shew he acted as trustee, and did not qualify as clerk.

The county court rendered judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued, on notes, before ARCHER, C. J., CHAMBERS, SPENCE and MAGRUDER, J.

By T. S. ALEXANDER, for the appellant.

The constitutional objections to the primary school system were opened and fully discussed on the former appeal, and are now under consideration. On the present occasion, the appellant's counsel will confine himself to the discussion of the questions of irregularity, which are peculiar to this case,

2. It is alleged, that the proceedings of the meeting held in July 1843, were void, because of the irregular proceedings of the meeting in July 1842, which it is said, disorganized the district, and suspended the powers of the taxables.

The specific irregularities alleged, are, that the trustees and clerk were elected *viva voce*, and not by ballot; and that the clerk did not give bond, as required by law. I have already, in the former case, discussed the effect of the irregularity in the manner of conducting the elections of 1842, and shown, as I trust, that it is cured by the act of 1828, chap. 169, sec. 5.

The only effect of the irregularity, if not cured, would be to avoid all the acts of the meeting of 1842. It cannot disorganize the district, or dissolve the corporation. In 9 *Wendell*, 35, *Reynolds vs. Moore*, and in 7 *Wendell*, 341, *Ring vs. Grant*, it has been decided, that in an action like the present, the plaintiff cannot show an irregularity or defect in the original organization of the district. If a defect in the original organization, which shows that the district was never duly organised, cannot be relied on, for the purpose of avoiding subsequent proceedings of the district, you cannot, on any principle, admit that proceedings, in themselves regular, of a district regularly organized, shall be avoided by proof of an intermediate irregularity. The act of 1825, chap. 162, sec. 9, expressly provides, that the clerk, trustees, and collector, once duly appointed, shall continue in office until their successors shall have been elected. An irregularity or defect in the mode of conducting an election, may vitiate the whole proceeding. It cannot disorganize the district, since provision is made to supply the defect created by a failure to elect, by an election, which, by reason of its irregularity, is to be treated as no election.

The taxables of the district, having the power of assessing taxes, and electing officers to manage their local affairs, constitute for those purposes a corporation; a corporation, not private but public, and clothed with political powers of great moment. Now, it is not true, that a political corporation, entrusted with important political functions, can be dissolved by

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an irregularity in its proceedings, or in the succession of its officers or members. As a general rule, the acts of a person claiming to be invested with a particular office, and exercising publicly, and with general assent or acquiescence, the powers annexed to that office, must be respected. The remedy against usurpation, is to be found in the exercise of the power of *amotion*. You cannot avoid the act of the intruder; much less can you affirm, that an acquiescence by a corporation, in an intrusion, shall work a dissolution of the body. The commissioners of *Anne Arundel* county constitute a corporation. The law provides for a continued succession of its members, and I grant, for the purpose of the argument, that an election irregularly conducted, would not clothe the persons elected with the legal character of corporators. Yet, if the persons claiming to be the commissioners under such irregular election, were permitted to assume the office of commissioners; to possess themselves of the records of the corporation; to adjust the county expenses and impose a tax, and to appoint a collector and other local officers, could it be safely affirmed, that those proceedings were simply void, that the collector could not enforce the collection of the tax? that the killing of a constable thus appointed, whilst in discharge of the duty incident to his office, would not be murder? Will it be argued, that an irregularity in conducting the elections of commissioners in the year 1842, dissolved the corporation, and that the persons now acting as commissioners, in virtue of an election in 1843, are exercising the functions of an office which has no existence? If none of those positions can be maintained, it will be still more difficult to prove that a corporation, aggregate of an indefinite number, exercising in general meetings its most important functions, can be dissolved by a failure to elect, or mere irregularity in electing an executive officer. The consequence of maintaining the judgment of the county court, in this case, will be, that every one who is not inclined to pay his State or county taxes, will attain his object, by examining into the proceedings of the commissioners for some five years past. None of them, it is apprehended, will endure a severe scrutiny. It

is impossible to adopt any legal principle in support of the proceedings of the county commissioners, which will not apply with equal force, when invoked to the aid of the proceedings of the taxables and their trustees. And, indeed, their case is placed beyond the reach of cavil by the act of 1828, chap. 169, sec. 5, which expressly commends the primary school system to the protection of our courts of judicature, and declares, that no proceedings of the taxables or of the trustees, shall be set aside, or adjudged to be void for defect of form, or any irregularity therein, so as the requisitions of the acts are substantially complied with. The informal or irregular proceeding is to be sustained; and yet it is to be argued, that such informality or irregularity shall work a dissolution!

This act avoids all consequences of an irregular or informal proceeding, and therefore would repeal any inconsistent provision, which existed in the previous act of 1825, chap. 162. But in fact no inconsistency is to be discovered. Section eight of this last act, provides for the original organization of the district, and for the failure to organize after meeting, by an adjournment without day, or from any other cause. It cannot apply as a perpetual provision. After the first, or other meeting, has appointed a day for holding future annual meetings, there can be no adjournment without day, in the sense of the section. After one election, duly conducted, the offices will remain filled; and provision is made for other meetings, at which the omissions of the annual meetings may be supplied. If in all these important particulars, the law has so anxiously guarded against the consequences of irregularity, it is reasonable to infer, that informalities of less importance were not designed to accomplish a disorganization.

Nor is it unworthy of notice, that the effect of the irregularity is expressly submitted by the law to the judgment of the commissioners, and they are the exclusive judges of every question arising under the provisions of that section. If in their opinion, the district has from any cause been dissolved, they are to convene another. Can any court of justice or other

jurisdiction, in opposition to their judgment, determine that the first meeting was not dissolved, and sustain the proceedings of, and officers appointed by the first meeting, against the proceedings of, and officers appointed by the second meeting? If the commissioners should determine that the meeting was not dissolved, and refuse to convene another, could a court of justice reverse that judgment, and annul the proceedings of the first meeting? And what would be the consequences of such judgment of reversal? The district would be deprived of its school, and of its capacity to organize another, since the initiatory proceeding must be taken by the commissioners. We are brought, then, to this alternative: the section commented on must refer to an original meeting exclusively; or the question of dissolution, by the irregularity of a subsequent meeting, must be referred to the jurisdiction of the commissioners? Either alternative may be adopted by our adversaries, since it is to be inferred from the record, that the commissioners treat this as a regularly organised district.

The failure of the clerk, appointed in 1842, to give bond, could not work a dissolution, The giving of bond is essential to his due qualification. But a vacancy in the office of clerk, does not disorganize a district. Neither is such effect produced by a failure, on the part of the taxables, to elect a clerk by ballot. Provision is made by the law for the continuance in office, of the officer once inducted, until the regular appointment of his successor. We have shown the case of a clerk, duly elected and inducted, and entitled, because of the irregularity in a recent election, to hold over, and yet yielding his office to another, who claims under such recent election, which by reason of such irregularity may be avoided. All the cases shew, that the acts of such usurping clerk, exercising the functions of clerk with the assent of the person lawfully invested with that office, and with public approbation, must be respected as if he had been legally inducted into office. 9 *Wendell*, 17, *McCoy vs. Curtier*. 7 *Wendell*, 341, *Ring vs. Grant*. 5 *Wendell*, 231, *Wilcox vs. Smith*.

The record admits, that the persons giving notice of the meeting of 1843, was elected (though the argument concedes irregularly,) clerk by the meeting of 1842; that he acted as clerk, from his election up to the time of meeting in 1843, without objection to his authority as such. Upon those cases and those admissions, I insist, that the notice in pursuance of which the meeting of 1843 was convened, is to be treated as given by the duly qualified clerk. I deny next the necessity for any notice of an annual meeting. The time of holding the annual meeting is fixed by the taxables, and all persons are bound to take notice of that day. The law requiring the clerk to give notice of such meeting, is directory merely. I think this may safely be inferred from section 10, and proviso to section 8 of the act of 1825, chap. 162. But this point was discussed in the former case, and is therefore to be rested on that discussion.

3. Assuming then that the district remained organized, and that the clerk elected in 1842, notwithstanding the irregularities existing in his election and qualification, was right in giving notice of the meeting of 1843, it is next to be shewn, that the form of the notice was sufficient for its purpose. One would suppose, that if defect in form could be tolerated in any proceeding whatever, it ought to be in the form of notice. No form is prescribed by the law. The act of 1825, chap. 162, sec. 10, simply requires that notice shall be given of the time and place of meeting. A designation of time and place is essential to the notice. Every thing else is surplussage. Does a notice then, that the meeting will be held for the purpose of voting a tax "for the support of the school for the ensuing year," or for any other specific purpose, restrain the meeting from transacting any business, which might have been transacted at a meeting convened after a more general notice? By no means. It might possibly be argued, that where a special meeting is called by the trustees, for a particular purpose, it should transact no other business than such as occasioned its call. But an annual meeting does not derive its authority to convene, from the order of the trustees or notice of the clerk.

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Provision is made for the annual meetings by the law, which also enumerates the powers which such meetings may exercise. It may safely be affirmed, that the authority of an annual meeting to entertain and vote on any particular subject, is not to be restrained by the notice of the clerk. Else may the clerk defeat any purpose of the law. He might omit to state in his notice that officers were to be elected; and then it might be argued, that the corporation would be dissolved. He might omit all notice of the tax proposed to be assessed, and then no tax could be laid.

4. The tax, it is said, is retrospective in its objects, and not prospective; is not with the provision of the acts, but for purposes not prescribed by them. The specific objection, as is more specially stated in the third point, is, that the tax was imposed "to defray the necessary expenses of the district during the past and for the present year." What items are included under the head of "necessary expenses," do not appear, and consequently it cannot appear that the taxables have provided for any expenditure which it is not right to provide for. We are to assume then, that they are proper in their character, and the only question can be, whether the taxables can raise by taxation, a fund for payment of liabilities which they have previously incurred? In discussing this question it is to be assumed, that the law designed to confer on the taxables the authority to raise the sums, necessary to defray the expenses which they might incur in the exercise of their powers. And that they may, occasionally experience the very casualties which sometimes intervene to embarrass other public bodies and individuals. They may vote a tax of \$500 to build a school house, which may in fact cost them \$1,000. Would you debar them of the power of providing for payment of the additional expense? Their proceedings in assessing a tax may be void, and may not be so adjudged until after the expenses which it was designed to meet have been incurred. Would you say that those expenses should remain a charge and incumbrance on the district, until a special act of the legislature should enable them to provide for its discharge? A school

house may be erected at a necessary cost of \$2,000, which the convenience of the district would require to have discharged by instalments. Would you subject the taxables to the charge for the entire amount in one year? Why would you deprive the taxables of this power of providing for payment of past expenses? No reason can be given for subjecting the taxables to this restraint, other than that as the assessable property in the district is continually changing hands, a tax to be imposed at this present time, would reach persons who were not subject to taxation during the past year, and would not reach many who will be subject to taxation during the succeeding year. This was the argument used in the court below. It assumes, that the persons owning property at the time a debt is incurred, must defray their aliquot proportion of that debt. But the act of 1825, chap. 162, sec. 12, requires the tax to be imposed on all the assessable property in the district, agreeably to the assessment of the last preceding tax. Upon the hypothesis suggested, the county tax may have been laid in January, the district tax may be voted in December, to defray the expenses of the succeeding year. All this the argument assumes to be admissible. Is there any greater injustice to result from permitting the meeting in December, to assess a tax for the then preceding year? There is nothing in the act, (vide section 8,) or in the act of 1828, chap. 169, sec. 3, which requires the taxation to be prospective. The language of those acts is just as broad as is to be found in the act of 1794, chap. 5, sec. 1, which requires the justices of the levy courts to meet annually, "to adjust the ordinary and necessary expenses of their several counties." Under this law, some of the levy courts adjust their expenses already incurred. Others provide only for future expenses, whilst others again provide for expenditures of particular classes already incurred, and as to others by way of anticipation. Will you deny to a levy court the power of providing a fund, to defray an expense which is about to be incurred? or to provide for payment of a debt already contracted? May not a recovery be had against a levy court for a debt contracted by its authority? And

would not a court compel the levy court to make a levy, for the purpose of discharging the judgment? The like law holds with regard to debts contracted by school trustees, and recoveries had against them. To say that the property in the district may have changed hands since the debt was incurred, begs the question. The alienation was made *cum onere*. The practical inconvenience of assessing, or attempting to assess a debt in due proportions on the persons taxable, at the moment the debt was contracted, would be extreme. The debts increase day by day. The alienations are daily made. But the spirit of our institutions require that the tax-gatherer should be seen once only in the year. The 13th section of the Declaration of Rights expressly declares, that every "person in the State ought to contribute his proportion of public taxes for the support of government, according to his actual worth." Here the charge is literally on the persons. But no one has yet ventured to deny the right of the legislature, to provide for future exigencies, or to supply the deficiencies created by the omissions of past legislatures. Can we charge the next generation with the debt we have created for works of internal improvements?

5. That the tax was not laid at an annual meeting. The answers to this objection are: 1. There is nothing in the law which requires the tax to be imposed at an annual meeting. 2. The notice states that an "annual meeting" will be held, and it is agreed, that the meeting purported and claimed to be an annual meeting. From these and the other facts admitted, it is fairly to be inferred, that the meeting was an annual meeting.

6. That two taxes have been laid in the same year for the same purpose. This is not true in point of fact. One tax was laid at the 12th annual meeting, held on the 30th July, (being the last Saturday,) 1842, the other at the 13th annual meeting, held on the 29th July, (being the last Saturday,) 1843. The first tax was voted to defray the liabilities then incurred and contemplated. The decision of the *Howard District* court was adverse to the right of the trustees to collect

that tax. In deference to the judgment of the court, the taxables suspended the collection of the tax, and assessed another tax, out of which they proposed to discharge the liabilities which were intended to be met by the first tax. There are not two taxes imposed for the same purpose. The last vote annuls the former vote, and all that can be collected is the last tax assessed.

7. That the tax last voted, was not raised in due proportion on all the taxable property in the district. The tax list made out is regular on its face, and there is nothing to show that it is not correct in every particular. The only pretext for this objection is, that by the third resolution, "every taxable who shall have paid the sum assessed to him by the resolution, passed on the 30th July 1842, shall be entitled to retain the sum, so paid by him out of the tax, which he may be liable to pay under the preceding resolutions." So far from inducing inequality, its adoption was essential to produce equality in contribution by the taxables. If partial collections of the tax of 1842 had been made, it would have been unjust to exact from those who made the payments, the entire amount of the taxes assessed by the resolutions of 1843. The further collections of the tax of 1842 being suspended, and the tax of 1843 being thereby necessarily increased, nothing was more just or equal than that the monies paid on account of the tax of 1842, should be refunded, or the taxable permitted to retain the amount out of the taxes chargeable to him in 1843.

8. That the property of the appellee has been taken in execution, for a part of the sum now demanded. This is untrue in point of fact. The property was taken by the collector of 1842; but was replevied by the appellee, and the judgment in that action was in his favor. The appeal now pending, does not affect in any manner that judgment or its consequences. If it should be affirmed, then there would be no ground for the objection; if it should be reversed, the appellee would be entitled to discount the amount assessed to him in 1842, from the sum claimed from him under the proceedings of 1843.

9. That the collector has not duly qualified according to

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law. This objection does not deny the due election of the collector; and indeed, this fact could not be denied, since his election is expressly affirmed in the record of the proceedings of the meeting. His qualification is alone at issue. His bond (the giving of which constitutes his qualification,) is set out in the record, and it is admitted, that it was accepted and approved by the trustees. It is impossible for me to discover any ground for this objection.

In the argument of the former case, I insisted, that the proceeding adopted in the case assumed, that the defendant was legally appointed and qualified as collector. I rely on that argument in opposition to this objection now taken.

10. That the person assuming to act as clerk was ineligible, having been previously elected trustee, and acted as such. That he could not act in both capacities, and the proceedings shew, that he acted as trustee and not as clerk. This objection is but a variation of the third objection: "The clerk of 1842 was also elected a trustee. He could not act in both capacities. He acted as trustee, and therefore was not clerk." That he did act as clerk, is clear from the notice under which the meeting of 1843 was held. And it is distinctly admitted, that he continued to act as clerk down to the meeting of 1843. He acted likewise as trustee; but this did not vitiate his acts as clerk. There is no incompatibility between the offices of clerk and trustee. 16 *Johns*. 135; and if there was, he was clerk *de facto*, and I have already shown, that as clerk *de facto*, his notice was to be respected.

Having thus answered all the objections taken on the record, to the authority of the appellant, to enforce payment of the tax laid in 1843, I presume to ask a reversal of the judgment of the court below.

By R. I. BOWIE, for the appellee.

The record in this case, shows an action of replevin, brought by the appellee against the appellant, for certain oxen seized, taken and detained by the latter, under the circumstances set forth in the case stated, as appears in the record.

The facts set forth in the case stated, on behalf of the appellant, are designed to show, that he acted by virtue of and in pursuance to the act of 1825, ch. 162, entitled, an act to provide for the public instruction of youth in primary schools, &c., and the several supplements thereto; and those introduced on the part of the appellee, to show that the seizure, caption and detention of the cattle, were not authorised by those acts, or any of them, for the reasons specifically assigned (as appears from the record,) in the court below; and the appellee further insisted, that if the caption and detention were in pursuance of said acts, or any of them, the appellee should recover, nevertheless, because those acts were unconstitutional and void.

The appellee's objections may then be reduced to two heads, as follows:

1. That the seizure, caption and detention of the appellee's property, were not authorised by the acts of 1825, chap. 162, and the several supplements thereto.

2. That if authorised by said acts, the appellee should recover, because those acts are unconstitutional and void.

Under the first point, assuming that the powers granted by the acts alone mentioned, to the inhabitants of the primary school districts, are "specially delegated powers," that the jurisdiction created by those acts, is a "special limited jurisdiction." The appellee insists, that the proceedings of the taxable inhabitants of the primary school districts, must be in strict conformity with the provisions of the laws authorizing them, and should show upon their face, the facts which are necessary to give them jurisdiction.

For the 1st branch of this postulate, vide *the State use of the Levy Court, vs. Merryman*, 7 H. & J. 91. 1 H. & J. 36. *Quyn, vs. the State use of Pue*, 1 H. & J. 359. *Ellicott, vs. the Levy Court. Kerr and al, vs. the State*, 3 H. & J. 560. 1 Pick. 109. *Metcalf's Dig.* 361, 362.

For the 2nd. Vide, *Wickes, vs. Caulk*, 5 Harr. & John. 42, 43, 45. *Shivers, vs. Wilson*, 5 Harr. & John. 130. 1 *Salkeld*, 475. *Cowp.* 26, 29. 4 *Bac. Abrid.* 656.

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The act of 1825, chap. 162, sec. 8 and 10, requires notice to be given of the annual meetings.

Sec. 8, prescribes and limits the the power to tax, "to purchase a site for the school house, and to build, keep in repair, and furnish such school house with necessary fuel, books, stationary and appendages."

The act of 1828, chap. 169, sec. 3, authorises a tax on the assessable property in said district, for the payment of the salary of a teacher in said district.

The objects of taxation being thus limited, and notice required of the annual meeting for these purposes, it is clear, the proceedings of the meeting must be confined to, or conform with the terms of the notice, otherwise the notice would be nugatory.

On the 15th July 1843, as appears from paper A, in the record, the taxable inhabitants of primary school district, No. 30, were notified to meet on the 29th of July 1843, for the purpose of "electing officers, and voting a tax, &c., for the support of the school for the ensuing year."

Under which notice, they proceeded to lay a tax, to defray the necessary expenses of the district, during the past and for the current year.

The tax voted, therefore, is not only a tax not warranted by the primary school laws, because not within the terms of those laws, but is a tax levied without notice, and contrary to notice.

Again, the whole tenor of those acts shows, that the taxes imposed should be annual and prospective, thereby protecting the people from the burden of accumulated and improvident expenses; in this case, in disregard of these plain and salutary provisions of the laws, the tax is biennial and retrospective. The resolutions attached to the tax list in paper A, show, that the retrospective tax was designed to operate only on the appellee, and those who like him, had refused to pay the tax imposed in 1842, the regularity and constitutionality of which, as regards the appellee, was then "*sub judice*" in this court. This was directly opposed to the 12th section of the act of 1825, chap. 162, which provides, that if the sum payable by

any person named in such tax list, shall not be paid or collected within the time limited, "it shall be lawful to renew such warrant," not to double the tax.

The legality of the tax in 1842, being then pending, by appeal, in this court, if the same should be pronounced legal, the appellee must be twice mulcted for one year's tax; or if the same should be declared illegal, the appellee must pay the same, notwithstanding the court's decision against it.

It is further insisted by the appellee, that the election of officers, held in 1842, being made *viva voce*, and not by ballot, as required by the act of 1825, chap. 162, the primary school district, No. 30, was disorganised, and those officers illegally elected, could do no act for the continuation of the corporation, but the duty of re-organization devolved upon the commissioners of primary schools, as prescribed by said act in such cases, who did not, as is admitted by the appellant, form or organize any district meeting of the taxables of said district subsequently.

2nd. The appellee should recover, because the acts of 1825, chap. 162, and its supplements, are unconstitutional and void.

The original act, sec. 29, 30, provides, that if the majority of the voters of any county should be in favor of the establishment of primary schools, as therein provided for, then and in that case, the said act should be valid for such county or counties, otherwise of no effect whatever; and if a majority of the voters of any county in this State should be against the establishment of primary schools, then and in that case the said act should be void.

This reference to the people of the counties, for the obligation or sanction of a law, is no where warranted by the constitution. It sprung either from a desire to avoid the responsibility of legislation, or a mistaken application of that clause of the constitution, which requires an amendment of the constitution to be passed by two successive legislatures. Whatever the source, the error is gross and pernicious. The counties have no separate political existence or character, &c.

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They are not recognised by the constitution, except as municipalities; they may be created or changed by the will of the legislature. A law depending on the assent or dissent of a county, is not more valid than if it depended on the assent or dissent of any number of individuals, in any other geographical limits, because the people of the county have no constitutional right of legislating for themselves.

The legislative power of this State is vested in a General Assembly, consisting of Senate and House of Delegates, from the counties and cities of the State. The citizens of *Anne Arundel* county, or *Howard District*, are entitled by the constitution to the benefit of their collective wisdom, without whose consent, it expressly declares no taxes shall be imposed. *Vide* twelfth section *Bill of Rights*.

By these laws, the sovereign power of taxation is delegated to an indefinite number of persons; the majority of those present may vote a tax "*ad libitum*," for certain specific purposes. The representative form of government is here utterly annulled. The law of Parliament, which governs all deliberative assemblies, and is one of the chief safe guards of freedom, is set at naught: the relation of representative and constituents (with the accountability of the former,) destroyed, and the minority left to the mercy of the majority of a mass meeting; in other words, of a mob. The bill of rights and constitution, contemplate and constitute a representative form of government; all the powers of which, are to be exercised by trustees or agents of the public, to which they are accountable. Fourth and fifth sections *Bill of Rights and Constitution of Maryland*.

"The bill of rights and constitution is a compact, made by the people themselves. In this compact, they have distributed the powers of government, and deposited the legislative, judicial and executive in separate and distinct hands, subject to such limitations and restrictions as they thought proper to prescribe."

"The legislature is not omnipotent."

"The power of determining the validity of the acts of the legislature, cannot reside with the legislature. It cannot be

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exercised by the people, because they cannot interfere by their own compact, unless by elections.” *Whittington vs. Polk*, 1 H. & J. 242.

“If they cannot interfere with the judicial power, because by their own compact they have precluded themselves, the same compact inhibits the exercise of legislative powers.”

“The constitution portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise.” *Crane vs. McGinnis*, 1 G. & J. 472.

“The power of making war, levying taxes, or of regulating commerce, are great, substantial, independent powers of sovereignty, which cannot be implied as incidental to other powers, or used as a means of executing them.” *McCulloh vs. The State*, 4 S. C. Con. Rep. 476.

“The only security against the abuse of power of taxation, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents.” *Ibid* 486.

Such was the security designed by the constitution of *Maryland*, yet if taxes may be imposed in detached districts, by an inconsiderable and inconsiderate mass, where is the protection to the unfortunate private citizen who may be exposed to their power? The constituent may groan, but the legislature will not hear his cries, or participate in his burdens. The State of *Maryland* is not an association of counties, its entire territory and its whole people, constitute an integral government.

The united wisdom of the General Assembly is the constitutional guaranty of every citizen for the protection of his life, liberty and property.

It is insisted, the General Assembly cannot delegate the power of taxation to the people in mass, without the forms of a municipality or corporation. If so, the nature of the government might and would thereby be radically changed.

Representation or legislation by agents or trustees becomes a nullity; the freedom and frequency of elections is rendered abortive; and every republican principle is merged in a pure democracy.

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The act of 1825, ch. 168, if originally binding, was a compact between the legislature and the counties accepting it, investing the taxable inhabitants of those counties with certain valuable franchises and privileges. Sections 8, 15, 23.

It secured to them, upon complying with the provisions of the law, certain funds, to be applied to the payment of the salaries of teachers. Sec. 15. 1828, ch. 55, sec. 3, intended as a bounty for the promotion of education.

The law which was accepted by the taxable inhabitants of the counties as an act of grace and favor under these inducements, cannot constitutionally be altered by the act of 1828, ch. 169, and converted into a law for raising revenue for the purposes of education. *Dart. Col. vs. Woodward*, 4 S. C. *Con. Rep.* 579, 581.

The act of 1825, ch. 162, was addressed to and accepted by the taxable inhabitants, and vested its privileges in them; men, women, citizens or aliens.

The act of 1828, ch. 169, transfers all the powers given to the taxable inhabitants to the free white male citizens.

Thus limiting privileges which had previously been granted to a large class for a valuable consideration to a comparatively small portion of the community.

The appellee further insists, that if the legislature can delegate the power of taxation and legislation, they must be restored to the people at large, from whom they were derived, that is to say, to every person authorised and qualified to vote under the constitution of *Maryland*; that the primary school law and its supplements, in this respect are unconstitutional, because they deprive the people at large of the school districts, of any voice in the election and control of the schools, and vest the power solely in the taxable inhabitants, or "free white male citizens, residents of and taxable in said districts respectively."

Contravening and annulling in the judgment of the appellee, the act of 1809, which secures the right of suffrage to every "free white male citizen above twenty-one years of age," and having resided "twelve months in the State, and six months in the county."

By the operation of these laws, the right of suffrage and legislation on the most valuable and momentous subject, the instruction of our own offspring, is taken away from the legislature, which represents and sympathises with every citizen, and is responsible for the faithful discharge of its duty to its constituency, and placed in the hands of a privileged and irresponsible majority, to be used without check or control.

MAGRUDER, J., delivered the opinion of this court.

An attempt to collect, by a seizure and sale of his property, the taxes imposed upon the defendant, in and by the taxable inhabitants of school district, No. 30, in *Howard* district, gave rise to this suit.

This tax, as it appears by the case stated, was imposed at a meeting which took place on the 29th July 1843, and was a tax of sixteen cents on every hundred dollars of taxable property within the district, in order to defray the necessary expenses of the district “during the past, and for the current year.” If the meeting and the proceedings, which took place on that day, were authorised by law, then the defendant in error cannot sustain the action of *replevin*, which was brought by him, and the proceedings in which are now before us.

It is designed to notice the points which were raised in the court below, and in the order in which they were introduced into that court.

The first objection to this law, that it is unconstitutional, has been already over-ruled by this court, in the case between these same parties, decided at June term 1844.

One ground, on which the defendant in error insisted, that the tax could not legitimately be demanded, was, that the trustees, clerk, and others, at the preceding annual meeting, in July 1842, were not elected by ballot, but *viva voce* ; and the clerk did not bond. Because of this, it is contended that the said district is disorganised, and the power of the taxables suspended.

It appears by the case stated, that a notice of the meeting, which was to take place July 15th, 1843, “for the purposes of

electing officers and voting a tax on the assessable property of the district, for the support of the school for the ensuing year," was signed "*George L. Stockett, clerk.*" The meeting took place, and to the proceedings of that meeting, in the election of officers for the ensuing year, no objection is taken ; but the incurable error consisted, in the election of those, of the previous year.

The minutes of the proceedings of that meeting which constitute a part of the case stated, tell us, that *George L. Stockett*, was nominated, and elected *unanimously*: and surely, from this entry we are not bound to infer, that he was elected illegally? This entry, at all events, must be one of "the matters of form," which the *Act of 1828, ch. 69*, requires us to disregard.

According to the reasoning of the counsel for the defendant in error, the election must be pronounced to be void, unless the minutes state every thing to have been done, which the law requires to be done. The law says, that the election must be by ballot ; and therefore, and in order to be valid, it is not only necessary that the election should be by ballot, but the omission to state on the minutes that it was by ballot, vitiates an election, to which no other exception can be taken. It will not be denied, that in some of the old cases, to which we are referred by the counsel, expressions may be found attributed to the court, which would seem to justify this reasoning. Those expressions are generally to be found in cases, where, by their own showing, the acts done were contrary to law, and seem to have been used without reflecting, that as they might be understood, they would take from us much valuable law.

The election does not appear to have been by ballot ; and moreover, it does not appear that the clerk gave bond, as the act of 1825 requires. Now these objections, which are designed to take from the clerk his office, are urged in a suit to which the clerk is no party. See *7 Sargeant & Rawle.*, 392. Besides, the act of 1825, ch. 162, sect. 9, provides, that the clerks, &c., of each district, shall hold their office until the next annual meeting, and a new election shall be made.

Now, we find, that *George L. Stockett* was in the office, acting as clerk, in July 1842; and are we, in this suit, to which he was no party, and grounding our opinion upon this statement, to determine, that he was not legally in the office, the duties of which he was discharging?

In the case of corporations it is considered, that the recording of an official bond is not essential to its validity, unless it be so expressly declared. A vote or resolution appointing an agent, need not be entered on the minutes, but may be inferred from the permission, or acceptance of his services. See *Angel & Ames on Corporations*, 157, and the case there referred to, of *Dunn, vs. Saint Andrews Church*, 14 *Johnson's Reports*, 118. The authority continues, "we need hardly add, that if in such case the agent is held to be duly appointed, as between the corporation and himself, *a fortiori*, he would be, as between the corporation and third persons."

"Persons acting publicly, as officers of a corporation, are presumed to be rightfully in office; acts done by a corporation, which presuppose the existence of other acts, to make them legally operative, are presumptive proofs of the latter; and although the charter or act of incorporation prescribes the mode in which its officers shall be elected, and an election contrary to it, would unquestionably be *voidable*, yet if the officer has come in under *color* of right, and *not in open contempt of all rights whatever*, he is an officer *de facto*, &c." See *Angel and Ames*, 158, 159.

An act of Assembly, confers upon the mayor and aldermen of the city of Annapolis, authority to take the acknowledgment of deeds, which are designed to transfer the title to land from the grantor to the grantee. Surely a party who claims under a deed so acknowledged, is not, in order to make the deed evidence, to prove that the mayor was what he professed to be, that is, was duly elected to the office.

It seems however to be thought, that these trustees, clerks, &c., are to be regarded as special agents, deriving from the law special authority, and their acts, in order to be valid, must be proved to be, in every respect, according to the strict letter

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of the law; and that the law, with respect to the acts, and the inferences from the acts of corporations, are not applicable to them and their actings. The correctness of all such notions may be questioned. In the case of the inhabitants of the fourth school district, in *Rumford, vs. Wood*, 13 *Mass. Reports*, 193, chief justice *Parker* in delivering the opinion of the court, admits, that they, (the school districts,) are not bodies politic or corporate, *with the general powers of corporations*; and he tells us this may be said of towns and other municipal societies. He then proceeds: "they may be considered under our institutions as *quasi* corporations, with limited powers; co-extensive with the duties imposed upon them by statute or usage," and he is brought to the conclusion, that in construing their acts, a liberal view should be had to the end intended to be effected. See, also, *Angel and Ames on Corporations*, p. 18.

These authorities, in connection with the act of 1828, ch. 169, will, it is believed, justify the court in over-ruling this and other points, which were raised by the defendant's counsel, in the court below.

It is also objected, that the notice given by the clerk, declared the object of the meeting to be, "for the purpose of electing officers and voting a tax, &c., for the support of the school *for the ensuing year*." To this notice the objection does not apply; but it is said, that the tax voted, was to "defray the expenses of the district, during the past and for the current year, such being the language used in voting the tax."

What are the powers of these people, when assembled in district meeting, in regard to voting taxes? "To vote a tax on the resident inhabitants of each district, as they or a majority of such of them as may be present, as aforesaid, shall deem sufficient to purchase a suitable scite for the school house, and to build, keep in repair, and furnish such school house with necessary fuel, books, stationary, and appendages; and to repeal, alter, regulate and modify all such proceedings, or any part thereof, from time to time, as occasion may require." And surely, in the discharge of these duties, it may be neces-

sary to raise funds, in order to defray expenses already incurred, and (as required by another clause,) to “pay the salaries of such teachers.” The officer must give notice, and did give notice, of the time and place of meeting. What follows, cannot make the notice illegal, although it had not stated that all the business which was actually done, (such as acting upon claims, directing the payment of them, &c.,) would be done. It may also be observed, that between the notice and the vote, there is not that difference which is suggested. The tax to be voted, is to pay what is then due, and what it is known will be due in the course of the year: and provision for the payment of what is already due, and what in the course of the year is to become due, is made by voting a tax for the support of the school; that is, to pay debts which, no matter when contracted, are payable in the course of the coming year.

Perhaps it would be desirable to ascertain, at the beginning of the year, the amount of expense to be incurred in the course of that year, and provide for the prompt payment of it; but then, this is impossible, as it cannot be known what will be the amount of expenditures for repairs, books, fuel, &c. They must sometimes purchase upon credit, and in order to pay for what is thus purchased, it is necessary to vote a tax, which is to defray expenses during the past, as well as the ensuing year; and this may, with strict propriety, be said to provide for the school for the ensuing year. This too, is an answer to the fourth objection, that the tax is retrospective, and not prospective.

We perceive nothing which warrants the objection, that the tax was not voted at the annual meeting of the taxables; nor that two taxes have been laid in the same year for the same purpose; nor does there seem to be any foundation for the objection, that the sum voted as the tax, was not raised in due proportion on all the taxable property.

As to the eighth objection, it appears that the seizure there spoken of, (if in this case it can be noticed at all,) was illegal, and for that tax he is not responsible. It can furnish no

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objection to the vote, that a tax of sixteen cents, be laid in the year 1843.

The ninth objection assumes, that the collector is to be presumed not to be qualified, unless there be express proof of his qualification. He is an officer *de facto*; but if not *de jure* also, he is not in office. The defendant, himself, has sworn, (see affidavit *ante*,) that the very property for which this suit was brought, was seized by the collector, *Thomas Burgess*, for the school taxes, for the primary school district No. 30, of said district.

Of the last of the objections, which appear to have been relied on in the court below, notice has already been taken, and according to our view of such objections, this cannot be sustained. Besides this, it seems to have no foundation in law. The charter does not forbid the appointment of one of the trustees to be the clerk. It is true, that at the meeting in August 1840, it was voted, that in the opinion of the then meeting, it was incompatible in the trustees to hold another office, and perhaps, at some meeting an opinion was expressed, that the offices of trustee and clerk are incompatible; but these votes and expressions of opinion, do not *disqualify* any man.

The objections, all of them, assume, either that the legislature had no right to delegate to those appointed to exercise them, the powers given to them by the act of 1825, or, that the individuals to whom those powers have been delegated, must not only conform strictly to the provisions of the law under which they act, but that the minutes of their proceedings must show all the facts which are necessary to give them jurisdiction. "It is believed, that this would not be correct, even although the law of 1828 never had been enacted. But surely the legislature had the power to pass that law, and one object of it seems to have been, to require courts, in judging of their actings and doings, to judge them by other rules than those which are sometimes adopted, in determining upon the validity of the acts of special agents, who, by the nature and terms of their authority, can do nothing which they are

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not expressly authorized to do. Much is left to the discretion and judgment of the individuals, who are to execute the law of 1825. In their judgment the law reposes, and from the nature of the trust, must repose great confidence; and it will presume every thing which it requires to be done by them, to be rightly done, until the person, who would impeach their conduct, can furnish legal and satisfactory evidence, that they have done acts not necessary to be done, in exercising the powers and discharging the duties which the law requires of them.

But if for any or all of the reasons, which have been noticed, the proceedings of the clerk and other officers were to be considered illegal and void, still, it would be necessary to reverse the judgment, and order a writ of *procedendo*; because, the case stated, (whatever might have been intended by the parties,) does not authorise the court to give judgment, either for plaintiff or defendant.

Of course, this court can give no judgment upon the statement, but reverse the judgment, with costs, and order a *procedendo*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOHN HOYE vs. EDWARD JOHNSTON.—December, 1844.

A *second* patent for the same land will not be granted, according to the rules of the land office, until the *first* be vacated.

H., on the 5th September 1839, obtained a warrant of re-survey, to affect contiguous vacancy in *Allegany* county. On the 19th May, he made a survey; on the 31st July, returned his certificate into the land office, and on the 18th February 1841, paid the composition money. On the 29th June 1840, *J.* obtained a special warrant; on the 11th July, executed his survey; on the 24th, paid the composition money, and on the 27th January 1841, obtained a patent for his survey. This done, he successfully *caveated* the application of *H.*, for a patent on his survey. It appeared that *H.* was seized of the tract which his warrant was issued to re-survey; had made his survey before *J.* obtained his special warrant, and paid his composition money in time; his title relates to his survey of the 19th May 1840, and was prior in point of equity to *J.*'s title.

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An equitable title to vacant lands, will, in equity, prevail against a legal title, when the party possessed of the legal title, has procured it by means of fraudulent representations to the officers of the land office. Upon a bill, in such case, the patent will be vacated in favor of the equitable title, or the patentee decreed to convey the land to the injured party.

Under the act of 1822, ch. 128, sec. 3, the composition money for vacant land in *Allegany* county, may be paid within twelve months after the date of the certificate of survey.

By the terms of a special warrant, a party is forbidden from running his lines within the lines of any former or more ancient survey.

A party who sues out of the land office, a general or special warrant of survey, to take up vacant lands, has an opportunity to know, and is presumed to know, that before he obtained his warrant, another warrant for the same land, if the fact be so, had actually been located.

When a party has presumed or actual notice of a location made, and prevails upon a public surveyor to violate the instructions under which he was acting, and to misrepresent to other officers of the State, who were to judge of the fairness and regularity of such surveyor's proceedings, that in executing a warrant, he had conformed to the rules of the land office, and had so enabled a party to obtain a patent for land, this is a fraud affecting such patent.

Upon a bill in equity, filed by the holder of an equitable title to vacant land under the State, against the patentee of the same land, to vacate the patent as fraudulently obtained, the State need not be made a party. Ample relief may be had without the State, who has no interest in such a case.

APPEAL from the Court of Chancery.

The bill in this cause was filed on the 5th July 1841, by the appellant against the appellee, and alleged, that *John Hoye* of *Allegany* county, being seized of a tract of land in said county, called *Flavia*, held under a patent from the State, bearing date on or about the 7th September 1838, and one other tract called *Rotunda*, contiguous to which your orator supposed there was some vacant land, he did on or about the 5th September 1839, sue out a warrant to re-survey his aforesaid tracts, with liberty to include the contiguous vacant lands. That said warrant was shortly after placed in the hands of the surveyor of the said county for execution, and was by him on or about the 19th May 1840, executed, and a certificate of the re-survey made on behalf of your orator was returned into the aforesaid land office, whereby it appears that your orator's original tract called *Flavia*, contained the quantity of 354½ acres, and that the

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surveyor had included the quantity of 162½ acres vacant land, and that the whole was reduced into one tract by the name of "*Flavia Resurveyed*," as by reference to the said certificate now remaining in the land office, will more fully appear; and your orator herewith files a certified copy of the same as a part of this, his bill of complaint; that he duly compounded on his aforesaid certificate of re-survey, and thereby entitled himself to demand a patent therefor, and but for the acts and doings of the defendant, hereinafter named, would have obtained such patent in due season. But now so it is, that a certain *Edward Johnston*, contriving and intending to defraud your orator of the benefit of his aforesaid warrant of re-survey, and to appropriate the said vacancy to himself, sued out of the said land office, on or about the 29th June 1840, a special warrant for one hundred acres, to affect the aforesaid vacancy which had been included, as aforesaid, in your orator's re-survey, and on or about the 14th July 1840, laid the same upon the said vacancy, and caused a certificate thereof to be returned to the said land office, by the name of "*Fort Meigs*." That said *Johnston* paid the composition money and obtained a patent therefor, on or about the 27th January 1841. And your orator files herewith an authenticated copy of the said certificate, and prays that the same may be taken as part of his bill. And that the said *Edward Johnston* having thus obtained from the State a grant of the vacant land which was designed to be affected, and was in truth bound by your orator's aforesaid warrant of re-survey, and the actual execution thereof, prior to the date of the said *Johnston's* warrant, the latter, nevertheless, having, as aforesaid, procured the grant, entered a *caveat* against the issuing of a patent upon your orator's certificate, which *caveat* the Chancellor, as judge of the land office, by an order dated the 10th April 1841, ruled good, as will appear by the aforesaid certificates, and other, the proceedings in the said land office, to all of which your orator prays leave to refer as parts of this bill. That the said *Edward Johnston*, whom your orator prays may be made a defendant to this bill, at the date of the warrant, so as aforesaid sued out by him, and at the time of its execution,

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as aforesaid, on the 14th July 1840, had full and direct knowledge that your orator had previously surveyed and included the land now in dispute, in his tract called "*Flavia Resurveyed*;" and that he, the said *Johnston*, therefore purchased, with notice of your orator's prior equitable title and in fraud thereof, and your orator herewith files the copy of a statement of facts agreed and admitted by the parties upon the trial of the *caveat* in the land office, whereby it clearly appears, that the said *Johnston* had full and explicit notice of the equitable rights of your orator, at the time he took out and executed his said warrant; and your orator prays that the said copy may be taken as a part of his bill. And your orator is advised, that though your honor as judge of the land office, and in conformity with the ancient rules and usages of that office, ruled the aforesaid *caveat* against his before mentioned certificate of re-survey good, yet that judgment does not preclude him from asking for the equitable interposition of this court, and that, upon establishing the truth of his aforesaid allegations, he will be entitled to a decree vacating the patent, so as aforesaid, issued to the said *Edward Johnston*, or declaring that he shall stand seized of the land so granted, as trustee for your orator, and requiring him to convey the same to your orator. And your orator alleges, that he was utterly ignorant of the existence of the said warrant, and of the execution thereof by the said *Johnston*, until after the patent had been granted to him, the said *Johnston*, as aforesaid, and that the same operated as a surprise upon your orator, but that all the acts and proceedings of the said *Johnston* were had with full notice of the existence of your orator's warrant, and of its execution. In consideration, &c.

With this bill the various exhibits, therein referred to, were filed.

The defendant, *Edward Johnston*, by his answer admitted, that on the 29th June 1840, he sued out of the *Western Shore Land Office of Maryland*, a special warrant for one hundred acres, to affect a certain vacancy which he had previously discovered, and that in pursuance of said warrant, a survey was

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made, and the said vacancy was found to contain two hundred and forty-nine acres and three-eighths, and called "*Fort Meigs*," according to the certificate thereof, returned into the said land office. He further admits, that at the time when said survey was made, he was informed by one of the deputy surveyors of *Allegany* county, that the principal part, or perhaps the whole of said vacancy, had already been included in a survey which had been a short time previously made out for the complainant, called "*Flavia Resurveyed*." That upon receiving this information, he did not think proper to suspend the further execution of his warrant aforesaid, but caused the same to be completed and a certificate thereof returned, as aforesaid, believing that he was fully entitled to said vacancy. That having inspected the complainant's pretensions thereto, he saw, as alleged in complainant's bill of complaint, that his claim was founded upon a warrant of re-survey, which had been sued out upon the tract of land called "*Flavia*," which tract, if it can be assumed to exist at all, this defendant knew was not contiguous to said vacancy. That in order to ascertain the vacancy, this defendant had caused the elder adjoining tracts of land to be run out, of which "*South Bar*," patented to *Gen. James Swann* on the the 2nd March 1805, was one. That *Flavia* was also run out, but that it was found to lie entirely within the lines of "*South Bar*," and that being a much younger tract than "*South Bar*," it having only been patented on the 7th September 1838, this defendant regarded such tract as a non-entity, and looked upon the patent therefor, as a nullity. To show that *Flavia* does lie entirely within the lines of "*South Bar*," this defendant has caused a plat to be made out by the surveyor of *Allegany* county, which he herewith exhibits. Now this defendant is advised, that if at the hearing of this cause it should be assumed, that such patent is operative, and that *Flavia* has a potential existence, then upon its appearing, as shown by said plat, that *Flavia* is surrounded by the outlines of *South Bar*, and consequently cut off from the vacancy contained in "*Fort Meigs*" and "*Flavia Resurveyed*," this defendant's title to the same, he being the patentec of

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"*Fort Meigs*," must prevail against the pretensions of the complainant. This defendant further admits, that after he had obtained a patent upon his certificate for "*Fort Meigs*," he *caveated* the complainant's certificate of "*Flavia Resurveyed*." That at the hearing of said *caveat*, he relied chiefly in argument upon the fact, that the vacancy in controversy was not contiguous to the complainant's tract, "*Flavia*," and that after a full hearing of both parties, his honor, the Chancellor, as judge of the land office, ruled his *caveat* good. That as such judge, he decides in all cases brought before him, as by law he is bound to do, according to equity and good conscience, and agreeably to the principles established in the high court of Chancery, as if the matter were brought before him by a bill in chancery? This defendant, therefore, claims the decision which was made by the judge of the land office in said *caveat* case, as final and conclusive upon the question of right to said vacancy. That such decision is surely a judgment or decree between the same parties upon the same subject matter? And that the complainant cannot possibly rid himself of the binding and conclusive effect of such decision, unless he can shew (which is not pretended,) that such decision was brought about by fraud, accident, or surprise, or other similar means. And this defendant denies all; and all manner of fraud and conspiracy, with which he is charged by said bill, and prays, &c.

With this answer various exhibits were also filed; a commission was issued, the facts established under which, appear in the opinion of this court.

At July 1842, the Chancellor, (BLAND,) dismissed the bill with costs, being of opinion, that the patent of the defendant, *Edward Johnston*, has been properly obtained, without fraud, according to the law and rules of the land office, and therefore, cannot, upon the facts shewn, be vacated by any regular proceeding, much less by a bill like this, to which the State is not a party.

From this decree, the complainant appealed to this court.

The cause was submitted to ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MAGRUDER, J., upon arguments, in writing.

J. JOHNSON for the appellant.

This case comes before the court, upon an appeal from a decree of the Chancellor, passed on the 22d July 1842, dismissing the appellant's bill, with costs.

The facts as charged, admitted, and proved, are as follows:

The appellant obtained, regularly, a patent for a tract of land in *Allegany* county called "*Flavia*," on the 7th of September 1838; and on the 5th of September 1839, he took out a warrant to re-survey the same, and add contiguous vacancy, which warrant was executed on the 19th of May 1840; returned to the land office on the 31st of July 1840; and the composition money paid on the vacancy and improvements included in the re-survey, on the 15th of February 1841.

The appellant's original contained	354½ acres.
The vacancy included in re-survey	162½ "

Making	517 acres.
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On the 29th of June 1840, the appellee took out a special warrant for one hundred acres, to affect the same vacancy, which he caused to be executed on the 14th of July 1840, and returned a certificate to the land office on the 24th July 1840; paid the composition on the same day, and on the 27th January 1841, obtained a patent, calling the tract "*Fort Meigs*."

And on the day of the date of his patent, to wit, the 27th of January 1841, the appellee filed a *caveat* against the appellant's certificate, which the Chancellor, as judge of the land office, on the 10th of April 1841, ruled good.

The appellant then, on the 5th July 1841, filed his bill in the Court of Chancery, praying that the patent which had been issued to the appellee, might be vacated, and for general relief, upon the ground, as charged in the bill, that the appellee, when he obtained his warrant and made his survey, had actual knowledge, that the appellant had previously included the same land in his re-survey of "*Flavia*," and that, therefore, the appellee having purchased the land, with notice of the prior equitable title of the complainant, was guilty of a fraud upon his rights.

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The defendant's answer admits, that at the time of his survey, to wit, on the 14th of July 1840, he was informed, that the vacancy had been included in the prior survey of the complainant; but that notwithstanding such notice of the complainant's prior survey, he thought fit to proceed with the execution of his warrant, because, as alleged in the answer, the defendant had ascertained, that the complainant's original tract "*Flavia*," was embraced within the lines of an elder tract, called "*South Bar*," patented to *Gen. Swann* on the 2nd of March 1805. An agreement, signed by parties properly authorised, shews conclusively that the appellee, when he made his survey, had actual notice, that the land in controversy had been, prior thereto, included in the appellant's re-survey upon his tract called "*Flavia*."

It also appears, that "*Flavia*," the appellant's original, consists in part, of lots distributed to soldiers of the *Continental army*, in *Allegany* county, which lots were not alienated by the soldiers, to whom they were distributed, fifty years past.

Under an order of the Chancellor, passed on the 8th of February 1842, a survey was made, and the plat shows, that the 12th line of the appellant's original, touches the vacancy.

The Chancellor's decree, dismissing the bill, it is insisted, is erroneous, for the following reasons:

1. That the appellant's proceedings upon his warrant of re-survey, were all in strict accordance with the laws and regulations of the land office.

The warrant is dated 5th September 1839, and the re-survey was made, and the certificate returned to the land office on the 31st July 1840, and of course, within eighteen months of the date of the warrant. *L. H. As.* 273, 325, 466. Act 1795, chap. 88, sec. 7.

The appellee does not deny, that the survey was made, and the certificate returned in time; but he says, the composition money was not paid, until after the time limited by law for that purpose.

But the certificate of the re-survey is dated on the 19th of May 1840, and the composition paid on the 15th of February

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1841, within twelve months from the date of the certificate, which, so far as *Allegany* county is concerned, is in time, by the 3rd section of the act of 1822, chap. 128, which declares, "that all surveys of land, made after the passage of this act, in *Allegany* county, and returned to the *Land Office of the Western Shore*, and which shall not be compounded upon, within twelve months from the date of the certificate, shall be null and void;" thus by the clearest implication saying, that if the composition money be paid within the twelve months from the date of the certificate, it shall not be void. This act, shortly after its passage, received a construction from the late Chancellor, who said, that by virtue of it, parties in *Allegany* county have twelve months from the date of their certificates to pay the composition money, and in this construction, the present Chancellor expressed his entire concurrence.

The case then being free from this difficulty, the 2nd question relates to the equity of the appellant, to have the patent, granted to the appellee, vacated as fraudulent, because the appellee, at the time he made his survey and paid the caution money, had actual notice of the prior equitable title of the appellant.

The appellant's warrant of re-survey, dated the 5th of September 1839, gave him an equitable interest in all the contiguous vacancy, from its date. *Howard vs. Cromwell*, 4 H. & McH. 325, 330.

Under such a warrant, the party acquires the right of pre-emption in all the adjoining vacancy, and if he makes his survey, and pays the caution money in two years from the date of his warrant, he has a complete equitable interest in all the vacancy included in his survey. *Hammond vs. Norris*, 2 H. & J. 140.

Such being the established law of the land office, it would seem to follow, that a patent granted to another, in contravention of this law, ought not to be allowed to stand in the way of the party clothed with such rights.

If the appellant could have obtained a patent upon his certificate, there can be no doubt it would, upon the doctrine of

relation, have over-ridden the patent granted to the appellee; but this could not be done, because it is an inflexible rule of the land office, that two patents shall not, if it be known, issue for the same land, and the appellee having obtained a patent, though in fraud of the rights of the appellant, that patent must be put out of the way, before those rights can be perfected.

But this case does not stand, nor is the appellant's claim to relief, founded exclusively, or chiefly, upon his superior title, resting upon his prior warrant and certificate, against which it might be urged, that the greater diligence of the other party, had rightfully deprived him of these advantages. The admissions of the answer, and the agreement referred to, show that the appellee, when he made his survey, had actual notice, that the land in dispute, was included in the appellant's elder survey.

The appellee then, stands in the predicament of a purchaser, not with constructive notice merely, but actual notice of the prior equitable title of another, and consequently, his title will be made subservient to the title of the latter. A court of equity will consider such a purchaser, as a trustee for the benefit of the party whose rights he has thus sought to defraud or defeat. 1 *Story Eq.* 383, 384, *sec.* 394. *Murray vs. Ballow*, 1 *John. Ch. Rep.* 566, 576. *Murray vs. Fuister*, 2 *Ib.* 157. *Sugden*, 526, 527. *Mead vs. Ld. Orrery*, 3 *Atk.* 235, 238.

Taking the legal estate, after notice of a prior right, makes the party a *mala fide* purchaser; as if a subsequent purchaser has notice, at the time of his purchase, of a prior unregistered conveyance, he will not be allowed to avail himself of his title against the prior conveyance. 1 *Story Eq.* 385, 386, *sec.* 397.

The appellee supposes that he will not be visited with the consequences attaching to a purchaser, with notice of a prior equitable title, because, though he had notice at the time of executing his warrant, he had, as he says, no notice at the time of purchasing it.

Now the warrant of re-survey taken out by the appellant, bears date the 5th September 1839, and was actually executed on the 19th of May 1840, whilst the appellee's warrant was

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not issued until the 29th of June 1840, more than nine months subsequent to the appellant's warrant, and one month and ten days after the actual location of it. And consequently, when he purchased his warrant, he had constructive notice of the prior warrant and survey made by the appellant. 1 *Bland*, 326.

But he does not, in his answer, rest his defence upon this ground. The ground taken by him in his answer, is, that upon learning from the surveyor, when making his own survey, that the land he was about taking up, as vacancy, had been included in a prior survey by the appellant, he nevertheless determined to proceed, because he had ascertained to his satisfaction, that the plaintiff's original tract, "*Flavia*," was entirely included within the lines of an elder tract, called "*South Bar*," patented to *Gen. James Swann*, on the 2nd of March 1805.

The appellee, therefore, does not rest his case upon the ground of want of notice, but upon the supposed want of authority on the part of the appellant, to take out a warrant of re-survey. He says he had no such authority, because his tract, "*Flavia*," was included in the elder tract, "*South Bar*."

Now in answer to this pretension, it need only be said, that this court, in the case of *Hoye vs. Lee*, December term 1843, decided, that "*South Bar*" had no existence, for the reason, that it was embraced in *Soldiers Lots*, which had not, when "*South Bar*" was taken up, become liable to *escheat*.

But this pretension, that the appellee's title is to be respected, because he had no notice of the appellant's prior warrant and survey, at the time he purchased his warrant, though he had notice before he executed it, is unsustainable for another reason.

When he went upon the ground, to execute his warrant, on the 14th July 1840, he found it occupied by another, under a warrant then, undeniably, in full force, and which had been executed two months before, to wit, on the 19th of May 1840. Was it not then his duty to stop, and ask the State to reimburse him for the expense of his special warrant, by giving him authority to take up land elsewhere, according to the rules

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of the land office. This he did not choose to do, but undertaking to decide for himself, that the appellant's warrant was invalid, he proceeds with his survey, and presses with all the rapidity which the law would allow, the grant of a patent to himself, that he might be in a position to frustrate the prior right of the appellant, when he should call upon the State to comply with her engagement to him.

If, when apprised, as he admits himself to have been before he made his survey, of the clear rights of the appellant, he had suspended his proceedings, no injury would have accrued to any one; and the State might have kept her contract with the appellant, by giving him a patent for the land he had contracted to purchase, upon his complying with conditions, which she had herself prescribed, and with which conditions, he did strictly comply. Not having pursued this course, he, the appellee, must take the consequences of his attempt, to appropriate to himself property, to which another, as he knew, had a prior equitable title.

It is no objection to the appellant's application, to a Court of Chancery for relief, that the Chancellor decided against him as judge of the land office; such decision may be reviewed in Chancery by original bill. *West vs. Jarrett*, 1 H. & J. 538. In that case, a bill was filed in equity, after an adverse decision in the land office, and the defendant was decreed to convey to the complainant, the land included in the elder survey of the latter.

In the case of *Garretson vs. Cole*, 1 H. & J. 370, the Court of Chancery compelled a party, who had obtained a patent contrary to the rules of the land office, to convey to another party who had fairly taken up the same land, notwithstanding the Chancellor, as judge of the land office, had, upon *caveat*, decided against the complainant.

The power of a Court of Chancery, to vacate a grant improperly obtained, was also decided in the case of *Kelley's Lessee vs. Greenfield*, 2 H. & McH. 140, 141, 142.

In the case of the State, at the relation of *Yates vs. Smith and Purviance*, 2 H. & McH. 244, a patent was vacated by

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the Chancellor, because obtained from the land office, contrary to law; and in the case of the State, at the relation of *Hindman et al. vs. Reed*, 4 H. & McH. 6, the defendant was decreed, to convey to the State land included in his grant, which had been reserved to the use of the proprietary as a manor.

It is stated in the appellee's second point, that the attorney general is a necessary party to this suit.

In the cases of *West vs. Jarrett*, 1 H. & J. 538, and *Garretson vs. Cole*, *Ib.* 370, the attorney general was not a party, and in the latter case, which was a bill filed after a patent granted, the patentee was compelled, by decree, to convey to another, who, as the complainant in this case has done, had fairly complied with the regulations of the land office.

It is insisted therefore, that the attorney general is not a necessary party; but if the court should think otherwise, the decree will not on that account be affirmed, but the case will be remanded to the Court of Chancery, for further proceedings, that substantial justice may be done, by making the necessary parties under the provisions of the act of 1832, chap. 302, sec. 6.

The appellant respectfully insists, that a decree should pass, vacating the appellee's patent, or that he should be compelled to convey the land therein contained to the appellant.

By T. S. ALEXANDER for the appellee.

The appeal in this case is taken from a decree of the Court of Chancery, dismissing the bill filed by the appellant in that court, for the purpose of vacating a patent which had been granted to the appellee, for a parcel of land in *Allegany* county, with the view of obtaining a grant to himself, for the same land.

The appellant claims, under a warrant of re-survey, issued on the 5th September 1839, and executed on the 19th May 1840. His certificate was returned on the 31st July 1840, and compounded on the 15th February 1841.

The appellee claims under a special warrant, granted him on the 29th June 1840, and executed on the 14th July 1840.

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His certificate was returned on the 24th July 1840. On the same day the composition was paid; and on the 27th January 1841, he obtained his patent. It is conceded, that all his proceedings were taken according to the regular course of the land office. The only objection taken to his title in equity, is, that the appellant had acquired an equitable title to the same land by virtue of his warrant of re-survey, which would have been perfected by the issuing of a patent to him, but for the proceeding of the appellee, which is supposed to have been fraudulent as against the appellant.

The appellee, it is insisted, is a purchaser with notice of the prior equity of the appellant.

Express notice to the appellee is not shown, at any period anterior to the day of executing his warrant. At the time of purchasing out his warrant, he had no notice, in fact, of the appellant's pretensions. At the time of contracting with the State, and paying the first instalment of the purchase money, he was a purchaser without notice. He was, therefore, authorised to proceed to perfect his title, notwithstanding subsequent notice, and having now obtained the legal title, he may retain it against the equitable title of the appellant. I repeat, the admission and proof of actual notice applies to the time of survey, and not to the time of suing out the warrant.

He is not to be affected by constructive notice, upon a principle, that every man is bound to notice all the proceedings in the land office, in relation to land titles. The land office, though an office of record, is not a court of record; and no rule can be found more extensive, than that all persons are bound to notice the proceedings of courts of record. That they are not bound to notice proceedings in an office of record is clear. The enrolment of a deed, properly executed and acknowledged, is notice to all the world of a transmission of the title. This is allowed from the necessity, &c., of the thing, and for the security of titles. But it is not evidence of any covenant in the deed not connected with the title; nor is the enrolment of a deed, defectively executed or acknowledged, evidence for any purpose whatever. This distinction is war-

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ranted by the limitation of the rule itself. For a proceeding in a court of record binds only parties, and others claiming under parties *pendente lite*. A judgment against A, as heir of B, would not bind C, another heir of the same ancestor. Upon what principle then, shall a proceeding in the land office by the appellant, to which the appellee was no party, and of which he had no notice, vitiate a title acquired by the appellee *bona fide*, and for a valuable consideration paid down?

The appellant's case requires the concession of this proposition, that no one is bound by constructive notice of the proceedings in the land office. The only principle on which the opposite proposition can rest, is, that the proceeding is *in rem*, and binding the title, must affect with notice, all who would deal with the title. Let this be admitted: how then stands the case? The appellant had notice, constructively, of the suing out of the appellee's warrant, and of its location, of the return of his certificate, of payment of composition, and of his application for a patent thereon. He permits the appellee to negotiate with the State for a grant of the land in dispute, and pays down his purchase money, concealing from him the appellant's claim of title to the same land. Is it not fair to argue, that silence, under such circumstances, ought to be accepted as a waiver of the claim? If I permit another to build on my land without objection, I cannot afterwards assert my title against him. If I witness the execution of a conveyance, without giving notice of my incumbrance on the land thereby conveyed, the purchaser may claim protection against me and my heirs. Shall the appellant be permitted then to rely on a title, the knowledge of which he concealed from us until after we had parted with the purchase money, and acquired a legal title to the property purchased? Upon the principle of constructive notice, the appellant was capable, and his concealment of his title has operated to an injury. If his title had been disclosed in season, the composition money would not have been paid, and our warrant might have been located elsewhere. At this time the appellee has no remedy for recovering back the money he has paid the State. I con-

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clude, therefore, that the appellant will not strengthen his case by relying on the doctrine of constructive notice; and, that as the appellee had purchased out his warrant before he received any notice, in fact, of the appellant's claim, the latter has no equity against him.

Having thus shown that the appellee's title was not obtained against equity, I will next inquire into the merits of the appellant's pretensions. Now it is conceded, on the other side, that according to the rules of the land office, a patent cannot issue for land which is already granted. The first patent must be vacated, before a second can be issued. Hence it follows, by his own admissions, that the patent granted to the appellant, in 1838, was obtained irregularly, illegally, and by a fraudulent suppression of the fact, that the same land had been previously granted to *Gen. Swann*. Can he predicate an equity upon a title obtained by such practices? If the appellee's patent was revoked, it would not avail the appellant. The outstanding title in the grantor of *South Bar*, would present an insuperable obstacle to the issue of a patent on his certificate of re-survey. The Chancellor would never grant a patent in confirmation of a title, which, by the appellant's own showing, originated in a violation of the laws of the office.

The counsel for the appellant, anticipating this objection, has attempted to evade its force by affirming, that in some other case, it has already been adjudged by this court, that the patent for *South Bar* must yield to the patent for *Flavia*, the original. In answer to the argument of the learned counsel, it will be sufficient to remark, in the first place, that the record now before the court, and upon which alone, the court's judgment must be pronounced, furnishes no evidence, whatever, of any such alleged adjudication. And secondly, that in fact the cause to which the learned counsel would refer, has been remanded to the county court for a new trial, in the progress of which the rights of the parties may assume very different aspects. At this moment, and especially in this cause, the court is bound to assume the validity of the patent for *South Bar*; and must therefore conclude, that the rights claimed by the

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appellant, will, if allowed, operate to the prejudice of that elder grant. Where is then the basis, on which the appellant's pretence of equity may be rested?

If the patent for *South Bar* is valid, it clothed the patentee with the legal title to the land embraced within its limits, and no legal or equitable title to the same land could be challenged by the appellant, under color of the patent for *Flavia*, the original. Upon this hypothesis then, the appellant's warrant of re-survey was irregularly issued. For none other than the owner of the legal title, can sue out a warrant to re-survey the original, for the purpose of affecting contiguous vacancy. The warrant of re-survey was void simply, at least, conferred no right as against the appellee claiming under his special warrant. All this is apparent from the case of *Hammond vs. Norris*, 2 H. & J. 130. In that case, the court denied to a warrant of re-survey, its usual efficacy in binding the title to contiguous vacancy, on the ground of a defect in the plaintiff's legal title to the original. But the court further held, that a warrant of re-survey, obtained on a title defective at law, but equitable, may operate as a common warrant, and vest in the party an equitable interest in all the vacancy which may be included in the re-survey, from the time of payment of the composition money due thereon.

In applying the principles of that decision to the present case, it is to be observed :

1st. That in the original, on which the appellant sued out his warrant of re-survey, he had no equitable title. His original patent was sued out in violation of the rules of the land office, and in fraud of the rights of *Gen. Swann*. Under color of a title, thus tainted in its origin, no title could be asserted at law or in equity. I take the distinction between the case of a party, who having fairly purchased the original, endeavors, by a warrant of re-survey, fairly sued out, executed, and compounded on, to acquire title to contiguous vacancy, and that of a person, who, conscious of the fraudulent origin of his pretended title, would yet use it as an instrument for extending his acquisitions.

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2nd. The court in *Hammond vs. Norris*, decided, that a warrant of re-survey, sued out in a *bona fide*, though defective title in the original, will, after its location, be permitted to operate as a common warrant, provided the certificate of re-survey is returned and compounded on, before the grant is issued, on a subsequent survey. All those circumstances, i. e.—1, actual location; 2, return of certificate; 3, payment of the composition money; must concur to give title as against a subsequent purchaser. It is expressly declared, that the equity arises out of payment of the composition money, and the patent relates back only to the date of the certificate of re-survey. In this case, it is to be remarked, that the patent to the appellee was issued before payment of composition by the appellant, on his certificate of re-survey; and that the appellee had actually returned and compounded on his certificate, before the appellant's certificate was returned into the office.

Waiving, in the next place, all objection to the appellant's title in the original, and to the regularity of the warrant of re-survey, I will next inquire, whether, upon those concessions, he can predicate an equity to have the appellee's patent vacated? The right of the appellant, in this aspect of the case, must rest on the position, that the suing out of his warrant of re-survey was an appropriation of all vacancy contiguous to the original; and that a patent issued on his certificate would have related back as a conveyance to the date of the warrant. But in all the cases, it is laid down, that this principle of relation is an equitable principle, and that a party claiming the benefit thereof, must show that he has, in all his proceedings, conformed to the rules of the land office. Any departure from those rules, or irregularity, or laches in executing his warrant, or returning or compounding on his certificate, will place him beyond its protection, vide *Dorsey's Ejectment*, 98, &c. Vide especially, page 103, and the case of *Beall vs. Beall*, there cited from 1 *H. & J.*, 346.

Upon the authority of those cases, I insist, that the appellant's right of priority, acquired under his warrant, was lost by his failure to compound on his certificate within twelve

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months from the date of his warrant. And I apprehend, that if this case had originated in any other than *Alleghany* county, it would be conceded, that there had been delay in the payment of the composition money, and that such delay was fatal to the pretensions of the appellant. The endeavor of his counsel is, to show that in regard to the time limited for payment of composition, there is one law for *Alleghany* county, and another for the rest of the State. I must confess, that he is sustained by the authority of *Chancellors Johnson* and *Bland*, in his position, that in surveys in *Alleghany* county, the time for payment of composition is extended to twelve months from the date of the certificate. Nevertheless, I would most respectfully submit, that such authority is not conclusive of the question, when it comes under review of this court, and that the opinions expressed by the late and present Chancellors, tend to establish invidious distinctions, and to introduce anomalies, not contemplated by law. The act of 1781, ch. 20, sec. 6, declares, that the time for compounding shall be one year from the date of the warrant. By the act of 1795, ch. 88, sec. 10, if any certificate of survey or re-survey, shall be returned, and not compounded for, *agreeably to law*, such survey or re-survey, shall be liable to a proclamation warrant. The sec. 7 of the same act had declared, that no certificate of survey or re-survey shall be received into the land office, unless the same be passed by the examiner general, and returned to the office within eighteen months from the date of the warrant. Here is then the distinction taken, between a void certificate and a voidable certificate. A failure to return the certificate into the office, within eighteen months from the date of the warrant, annulled the certificate. A failure to compound on a certificate, duly returned within twelve months from the date of the warrant, rendered the certificate voidable at the suit of any one who would sue out a proclamation warrant to affect the same land. A certificate annulled, because of a failure to have it returned within time, left the land, intended to be affected thereby, in the same condition as if the warrant had not been issued, and liable to be taken up on any warrant and in

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any quantity. Under a proclamation warrant, the party was obliged to re-survey all the lands included in the original survey. Hence, it occasionally happened, that in *Allegany* county, large bodies were included in surveys which remained uncompounded on, and therefore, liable to proclamation, but to no other species of warrant; and therefore, by act 1804, ch. 75, reciting the grievance resulting in that county from that state of things, it is enacted, that all certificates of surveys of land in *Allegany* county, theretofore made and not compounded on, and then liable to proclamation, shall be on or before a day thereafter, unless then paid on or secured by proclamation, be vacated, &c. The clear effect of this act is, to annul the certificate after a certain time, but, in the meanwhile, to continue their liability to be proclaimed. In other words, certificates then voidable, were to remain voidable until a certain day, and then to become absolutely void. This act related only to certificates which had been, previous to its passage, returned into the land office. In the year 1822, other certificates were discovered to be in a like predicament, and the legislature therefore, by a *supplement* to the former act, and after a like recital with that contained in the original, by section 1, enacts, that all certificates of surveys of land in *Allegany* county, made since the passage of the former act, and not compounded on, and therefore liable to proclamation, be vacated, &c., on and after a certain day, unless then paid on. Up to that day, it is clear, those certificates were to remain liable to proclamation. And it is equally clear, that the legislature did not intend to enlarge the time for payment of composition, in favor of the owners of any of the certificates embraced within the provisions of either of those acts. The interest of the public, was the motive for each enactment; and this object was to amend, by vacating those certificates, absolutely, after a certain day, unless, before that day, they should be proclaimed under the existing laws. The next case of the legislature was, to provide against a repetition of the evil. This is done by section 3, which annuls all certificates thereafter to be made and returned, and not compounded upon

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within twelve months from the date of the certificate. This section, I submit, ought to be subject to the principle of construction, which is applied to section 1 of the same act, and the original act of 1804. And as neither affected to extend indulgence to the holders of certificates, we ought not so to construe the sec. 3 of 1822, as enlarging the time within which future certificates should be compounded. We ought not to assume, that the legislature designed to extend indulgences to the people of *Allegany*, which were denied to her citizens residing elsewhere. The true construction, I insist, is, that in future, certificates are to be returned within the time limited by the general law; are to be compounded on as directed by law; are to remain liable, as heretofore, to proclamation, and after a default, continuing until after twelve months from the date of the certificate, the survey shall be entirely annulled, and the land was so restored to its original condition, and be liable to appropriation as if it had never been surveyed. Not one word, it is to be observed, is said about repealing proclamation warrants in reference to *Allegany* county, nor is any state of facts given, which would have justified the legislature in extending to the people of *Allegany*, an indulgence for nearly thirty months, whilst the rest of the State remain subject to the original law, and may be required to perfect their titles within twelve months from the date of their warrant. It is to be observed, in conclusion, that this question may be treated as an open question, without any general inconvenience. A reversal of the Chancellor's opinion, in regard to the construction of the act of 1822, may, and will change the practice in the land office. But it cannot possibly impair any title derived under that act. The practical effect of the construction placed on the act, has been to prevent the acquisition of titles under color of proclamation warrants. But the titles, actually granted, will, under any construction of the act, remain unimpaired.

It is again insisted, that the form of the proceeding is improper. The attorney general ought to have been a party suing by information. The general rule is to be found in

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Mitford's pleading. A leading case on the subject, is to be found in 2 *Sch. & Lefr.* 617. I think it may be confidently affirmed, that, in every case in which the validity of the *King's grant* has come into question, the attorney general has been a party, and that in every instance in which the proceeding has been instituted to vacate a patent, it has assumed the shape of an information. It is fit, that in every case in which the *King's acts* are brought into question, there should be some one present, charged to protect his rights, and vindicate his justice. In many instances, the *King* is the exclusive judge of the propriety of vacating his own grant. The subject can assume the privilege of controlling or directing this discretion only where the grant conflicts with his vested rights; and even here the *King's* officers must have the privilege of determining whether there is a vested right, which is in peril by the grant. In the present case, the necessity for the presence of the attorney general is made apparent by a consideration of the relief which is asked, and which alone could be granted. The only relief that can be given, would be to vacate the appellee's patent, whereby the title would be reverted in the State. A conveyance from appellee to the appellant, could not be decreed, since this court cannot judicially know, nor can it be found, upon the proofs taken and admissions made between these parties, that the appellant has complied with all the conditions of the land office, and therefore, is entitled to a patent. It is admitted, for the purpose of this suit, that the appellant has compounded on his certificate. No such admission has been made on the part of the State. The case has been conducted between these parties as if the existence of the outstanding grant to the appellee, formed the only obstacle to the issuing of a grant to the appellant. For any thing that this court knows, or can judicially discover, there may be a multitude of other objections resting on a like number of *caveats*, interposed by other parties. Will the court undertake to say the appellant has complied with all the regulations of the land office, and the appellee's patent being removed, is entitled to his grant?

The appellant's counsel supposes this question is set at rest by the cases of *Garretson vs. Cole*, 1 H. & J., 370, and *West vs. Jarret*, 1 H. & J., 538. In one of these cases relief was granted by the Chancellor, but his decree was reversed on appeal. In the other, relief was denied by the Chancellor, but granted by the Court of Appeals. In neither of those cases, was the objection, now relied on, taken. And it is to be observed, that in each case there were circumstances of actual fraud, in violation of contract, which presents a peculiar case. It is not like the present, which rests on a pretended violation of the laws of the land office. In other cases, moreover, it will be found, that the attorney general was treated as a necessary party. These cases are just as strong to show, that he ought to be made a party, as the others can be to show, that he need not be made a party. If the State has an interest in the suits, that interest must be represented by the attorney general. If the State has no interest, then his presence as a party is improper. Now, I insist, that a decree passed on an information by the attorney general, is conclusive to show, that the State has a substantial interest in the subject of the suits. On the other hand, a decree passed between private parties only shows, that the court may have overlooked the existence of that interest, which needed the intervention of the State's attorney. The cases to which I refer, are to be found in 2 H. & McH. 201, 244. 4 H. & McH. 6. 1 H. & J. 332. 2 H. & J. 472, 487.

The learned counsel next insists, that if it should be adjudged, that the attorney general is a necessary party, the case may be remanded to the Court of Chancery, for further proceedings. This may be done, where the party entitled to sue, in bringing before the court the material defendants in interest, omits to make defendants of others, whose presence is necessary, for the purpose of making title or passing a complete decree. But there is no instance in which a case has been sent back, to make complainants of others, who ought to have sued with the complainant. When the cause is returned to the Court of Chancery, it stands as if no appeal had been

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taken, or decree entered, and the court is authorised to permit any proceedings to be had, which might have taken place anterior to the passing of the decree. Now, I apprehend, the practice in regard to making new parties, by amendment, would not justify the introduction of a new party as complainant. If one of two obligees, should inadvertently sue the obligor, he could not amend by joining his co-obligee, as complainant. He would have to dismiss his bill, and begin anew, or suggest a reason for bringing him before the court as a defendant. And the reason for this distinction is obvious. I may be made a defendant against my consent, whenever my presence is necessary to the determination of right between others. But I cannot, without my consent, be made to assume the attitude of complainant. The court cannot authorise A to use the name of B, as complainant. Nor is it just; nor would it conduce to dispatch or economy in the general administration of justice, that B should be permitted in concert with A, to become a party complainant to a suit, originally instituted by B. New process would require to be issued on such an amendment; and the defendant would be at liberty to make a new defence to the entire case. Where is then the advantage to be gained by a change in the practice? The utmost that can be said is, that the bill should be dismissed, without prejudice.

The present, is stronger than the case I have already stated. The attorney general is the necessary party complainant. He may sue on his mere motion, or in the relation of the present appellant. It is not necessary that the appellant should be a party at all. If he is permitted to unite with the attorney general, he is an auxiliary, and not a principal party, and his presence is necessary only to enable the court to make a complete decree. He stands pretty much in regard to the attorney general, as a *feme covert* does who sues without her husband. Could a *feme covert*, suing alone, amend by making her husband a party?

I submit, then, that the attorney general is a material and necessary party; that the suit ought to have assumed the form

of an information, and not that of a bill. For these reasons this decree ought to be affirmed, without regard to any supposed merits.

Next, I submit, that the appellant has no merits, and I rely much on the fact, that hitherto no effort has been made to set aside a patent, upon the ground of notice, simply of a supposed prior equity in the complainant. The absence of any such case is a strong, if not conclusive argument, against the claim pretended.

MAGRUDER, J., delivered the opinion of this court.

The plaintiff in error, filed his bill in the Court of Chancery, to vacate a patent which the defendant had obtained, on the ground, that the survey on which the patent was granted, was in fraud of his, the plaintiff's right.

These facts appear in the case. The plaintiff on the 5th September 1839, obtained a warrant of re-survey. He made his survey on the 19th May 1840; returned his certificate of survey on 31st July 1840; and paid the composition money on the 18th February 1841.

The defendant obtained a special warrant, 29th June 1840, (more than one month after the plaintiff's survey of his land,) executed it on the 11th July 1840, returned his certificate of survey, and paid the composition money, 24th July 1840; and on 27th January 1841, procured his patent, and then entered a *caveat*, to prevent the granting of a patent to the plaintiff, on his certificate of survey. The two certificates of survey include the same land. As the defendant had obtained a patent for land, comprehended in the plaintiff's certificate, as vacant land, no patent, according to the rules of the land office, can be given to the plaintiff until the defendant's patent is vacated.

One of the grounds of objection, to the relief asked, is, that the plaintiff was not seized of the tract of land, on which he obtained his warrant of re-survey. It appears, however, that the tract of land called *Flavia*, which was to be re-surveyed, was granted to the plaintiff himself, 7th September 1838; and that the land in controversy, was contiguous to that tract.

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The objection is, that this same parcel of land, had been previously granted to *James Swann*. The plaintiff's counsel insists, that it has been adjudged, that the alleged grant to *Swann*, must yield to the patent for *Flavia*; and the answer given to this, is, that the adjudication no where is to be found in this record; and from that adjudication, the plaintiff in error can derive no advantage. This will not be controverted; but then, the record furnishes no evidence, that the land claimed for *Swann* was an older tract than that of the complainant. It would be difficult for the court to discover, by an inspection of this record, that the plaintiff, at the time that he obtained his warrant of re-survey, was not seized of the tract called *Flavia*, and for which he, himself, had obtained a patent.

In addition to this, it may be remarked, that the plaintiff had made his survey before the defendant had obtained his special warrant. In the case of *Hammond vs. Norris*, the general court determined, that although a person, who has not a title to the land on which he obtains a warrant of re-survey, cannot thereby claim a right of pre-emption, in all contiguous vacancy, yet, such a warrant will operate as a common warrant. See 2nd *Harr. & John*. 141. And the plaintiff's certificate of survey, being older than the defendant's special warrant, then, upon the payment of the composition money, the title to the land commences from the date of the survey; provided, the composition money was paid by the plaintiff, within the time required by law.

The question then arises, was the composition money paid by *Hoye* in due time?

He made his survey, 19th May 1840; and paid the composition money 1st February 1841. If the land had been situate in other parts of the State, it would not have been paid, within the time required. But the warrant of re-survey was obtained on a tract of land in *Allegany*, and in that county all the vacancy, also, is situated. Whether, then, *Hoye* paid the money, within the time required by law, is to be decided by the act of 1822, ch. 128, sect. 3. This act declares all certificates of survey to be null and void, "which shall not

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be compounded upon, within twelve months from the date of such *certificate*.” If this law was now, for the first time, to receive its interpretation, it would seem to be clear, that the owner of the certificate of survey, by the payment of the composition money, at any time within twelve months after the date of his certificate, would be entitled to all the rights which he might have secured to himself, by the payment of it on the day of its date. Such is the construction it has received ever since its enactment, and now, none other ought to be given to it. The composition money was paid by *Hoye*, within ten months after the date of the certificate.

It is concluded, then, that the plaintiff in error has a right to impeach the defendant’s survey and grant; and is entitled to relief, if he has established the fraud, and asked relief in the proper form: was there any fraud practised by the defendant in the execution of his warrant, the survey of the land, the return of the certificate of survey, and obtaining the patent, by which the plaintiff in error is prevented from obtaining the patent to which he is entitled?

On the 29th June 1840, the defendant obtained a special warrant, and by the express terms of that warrant, he had authority to survey, in order to purchase the vacancy of which he gave a description; provided, that in making that survey, he did not run his lines “within the lines of any former or more ancient survey.” This he was evidently forbidden to do; and to prevent unintentional violations of this, the *second* of the rules, adopted by the Governor and Council in 1782, and which from time immemorial had been a rule of the land office, was adopted. See the rule in *Landholders Assistant*, p. 435; and opportunity was thereby afforded to the defendant to know, and he is presumed to know, that before he obtained his warrant, another warrant, whether in name a general, or special warrant, had actually been located; and this land, now in dispute, had been included in a survey by another person. Besides being presumed to know this, his answer admits, that he had actual notice of it, and with a knowledge of it, he actually prevailed upon the surveyor, to

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violate the instructions under which he was acting, and to represent to other officers of the State, who were to judge of the fairness and regularity of his proceedings, that in executing his warrant, he had conformed to the rules of the office; and by these misrepresentations the defendant so obtained the patent, which now enables him to deprive his antagonist of a grant, to which he is entitled. It is easily to be accounted for, that the officers of the land office, especially in earlier days, were not over-anxious for a rigid observance of the rules of office; or as a former Chancellor of *Maryland* observed, determined “merely with reference to the interests of the State, or perhaps its officers.” The *lord proprietary*, first, and then the State, had land to dispose of; and if the vendee paid the price asked, for every acre, to which his grant gave him a title, the vendor was no gainer by a rigid observance of these rules. Still, it was the duty of all to take notice, and not to violate those laws; and more especially, not by acting fraudulently themselves, to obtain an unconscientious advantage of others. Some, who take up lands in *Maryland*, seem to think, that there is scarcely any regulation of the office, which men, dealing for land, are bound to observe; except that which requires a man to be seized of the tract of land, upon which he applies for a warrant of resurvey; and accordingly, this defendant, who claims a right to urge this, as an objection to a grant being issued to the plaintiff, claims it, because of violations by himself of many of the regulations of the office; whereby, the officers were deceived, and the plaintiff is defrauded.

If indeed, such objections, as it may be presumed that the defendant would urge, in opposition to the claim of the plaintiff to a grant, had been established by proof, in the case, it would not be necessary for the court to inquire minutely into the actings and doings, and the motives for those actings and doings of the defendant; but as, in his efforts to destroy the plaintiff's equity, he has been so unsuccessful, it can no longer be controverted, that this whole proceeding on the part of the defendant, was in fraud of the law; and that, of the frauds practised, in order to obtain a patent to himself, and then, by

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the aid of that patent, to prevent the plaintiff from obtaining one, the latter has just cause to complain and to ask relief therefrom.

But, then it is contended, that although the defendant may have obtained his patent by fraud, and although the plaintiff in error, may be entitled to the relief which he seeks, yet, in this case, he cannot obtain it; and this, because the State has not been made a party, (either complainant or defendant,) to the suit. The counsel in the course of their argument, have furnished us with some cases like this, in which relief was given, although the State was not made a party to the bill of complaint.

We are told, that “the *non-joinder* of a mere nominal or formal party, will often be dispensed with, if entire justice can be done without him; or if he cannot, properly, be made a party to the suit.” *Story’s Equity Pleading* 196. No person should be made a party who has no interest in the suit, and against whom, if brought to a hearing, no decree can be had. Now, it would be difficult to prove, that the State has any interest in the decree, which may with propriety be passed in this case. The State, moreover, is not bound to be a party complaining; and has taken care to let it be known, that she does not choose to be a defendant in her own courts. It is not necessary that she should be a party; it should not rest with the State, or any department of its government, to say, whether one of her citizens, really aggrieved by another citizen, shall have justice administered to him. We have then precedent and rule to warrant the decision, that although the State is no party to the bill, ample relief may be had.

We therefore reverse the decree of Chancery, with costs in both courts, and decree, that the said *Johnston* shall convey to *Hoye*, in fee simple, all the land included in his patent, dated the 27th January 1841, for a tract called “*Fort Meigs*.”

DECREE REVERSED AND CAUSE REMANDED.

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ROBERT WELCH OF BENJAMIN, vs. JOHN PARRAN, ET AL.—
December 1844.

P. sold a tract of land to *T.* for \$8000; of which, \$1000 was secured by the vendee's notes; \$2000, due in 1841 and 1842, secured by the vendee's notes with *W.* as endorser; and the balance of \$5000, due from 1843 to 1847, secured by the vendee's notes with *D.* and *S.* as endorsers. The vendee died insolvent. The vendor recovered judgment, at law, against *W.*, and then proceeded in equity to sell the land, which he purchased in at \$4000. Upon a bill, filed by *W.* to compel *P.* to apply the \$4000 in discharge of the notes *first* due, and to *restrain* his proceedings at law upon his judgments, **HELD**: that the product of the sale should be so applied, under the direction of the Court of Chancery, as would give full security to the vendor, which might be done by enquiring into the pecuniary condition of the sureties.

If any one of the sureties should be found unable to pay, then the vendor should be secured by applying so much of the proceeds of sale, as would extinguish the note thus endangered.

The vendor is entitled to full payment from the one security or the other; or if one is insufficient, from the additional security. The endorsed notes are to be considered as additional securities.

The vendor is not bound to wait, during the time occupied in ascertaining the condition of the securities, but as the notes become due may enforce them at law.

Such of the sureties as pay, may be subrogated to the rights of the vendor, to the extent of any interest they may have in the purchase money.

Where an injunction issues to restrain proceedings at law, upon the ground of credits not allowed, and the defendant admits the credits in his answer, and consents to allow them, the injunction should be dissolved as to the balance due.

APPEAL from the Court of Chancery.

This was an appeal from an order, dissolving an injunction.

The bill was filed by the appellant, on the 22nd April 1844, and alleged, that about the month of December 1839, *James Tongue*, then of *Calvert* county, now deceased, purchased of *John Parran*, a tract of land, lying therein, called *Elkton Head Manor*, containing about 1231 acres, for the sum of \$8000; that the said land when so purchased, was covered with large quantities of valuable timber and wood, with the proceeds of the sales of which, the said *Tongue* expected to pay for the same, and in consideration of which, the said *Parran* allowed

the said *Tongue*, to pay the purchase money in many and extended instalments; that your orator knowing the premises, and relying on the proposed execution of a deed of trust, hereinafter mentioned, by the said *Tongue*, became a surety for the same *Tongue*, in the execution of two notes to said *Parran*, each for \$1000, in part payment of the said purchase money; one of them payable on the 1st January 1841, and the other, one year thereafter; that *Henry C. Drury, of William*, also became surety on two such notes, for the same amount, payable each for \$1000, the one on the 1st January 1843, and your orator believes, the other to be payable one year thereafter; that *John S. Skinner* also became a surety on three of such notes, each for \$1000, the times of the payment of which, though unknown to your orator, were to expire after the payment of the other notes aforesaid. That afterwards, about the 24th December 1841, the said *James Tongue*, executed the deed of trust above mentioned, to *Cephas Simmons* and *Richard Estep*, conveying the said land, with the approbation of the said *Parran*, to them, with certain other property therein specified, "in trust, for the sole object and intent, to defend and save harmless your orator and his aforesaid co-sureties," on account of their respective liabilities as aforesaid; that afterwards, to wit, about the month of September last, the said *James Tongue* departed this life, intestate, leaving *Gideon G. Tongue* and others, his heirs at law, and that there hath been no administration granted on his personal estate. That afterwards, about the 4th November last, the said *John Parran* filed his bill of complaint in this court, against the heirs and trustees aforesaid, of the said *James Tongue*, deceased, for the sale of the aforesaid land, to pay the purchase money, for which your orator and his co-sureties, were responsible as aforesaid; whereon such proceedings were had, that on the 23rd January last, your honor passed a decree for the sale of the said land, on the terms which the said *Parran* desired, viz: one third of the purchase money, payable in six months, and the balance in one and two years from the day of sale; that accordingly, on the 9th April instant, *Jonathan Pinkney*, the

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trustee for the sale thereof, sold the same to the said *Parran*, for the sum of \$4000; that by the said proceedings, it appears, that one of the notes aforesaid, on which your orator was a surety, hath been paid, and that \$300 hath been paid on the second of said notes, of which your orator was a surety, and that in addition thereto, your orator is entitled to another credit of \$100.38, as of the 21st October 1842, whereby, the balance now due by your orator, is reduced to the sum of \$848.40, as of the 25th inst.; that though the said *John Parran*, hath in his bill aforesaid, admitted, that your orator hath paid him the aforesaid sum of \$300, on the second note above mentioned, and hath the receipt of the solicitor and attorney of the said *Parran*, for the sum of \$100.38, as another payment thereon, yet the said *Parran* hath obtained judgment in the *Anne Arundel* county court, for the whole of the said second note against your orator, and hath levied execution of *fieri facias* thereon, on the property of your orator, and is about to sell the same by the sheriff of the county, at a forced sale, for cash, within a few days; that the purchase money due, as aforesaid, by the said *John Parran*, should be applied in the first place, to the extinguishment of the balance due, as aforesaid, by your orator to the said *Parran*, and should have been so made payable, as to enable your orator to have the benefit thereof; or the said *Parran* should be enjoined from proceeding to collect, by forced sale, this balance from your orator as a surety, when he has, by his own proceedings, placed the primary fund for the payment of the debt of the principal debtor, beyond the reach of your orator; all of which is contrary to equity and good conscience, and tend to the manifest injury and oppression of your orator; that at the time of the death of the said *James Tongue*, he had already cut down and ready for market, large quantities of valuable timber and wood, the proceeds of which, according to the agreement of the said *Tongue*, *Parran* and your orator, and other sureties, were to be applied to the payment of the purchase money of the said land, and to the discharge of the liabilities of your orator and other sureties, as they respectively became due;

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that the said *Parran*, your orator is informed and believes, and therefore charges, is collecting the said wood and timber, disposing of the same, and refuses to allow the proceeds thereof, to be applied according to the agreement aforesaid, to the extinguishment of the said *Parran's* judgment aforesaid, against your orator, although the same will be fully sufficient for that purpose; that the said timber and wood, constitute no part of the aforesaid purchase, from the said *Pinckney*, as trustee as aforesaid, nor hath the said *Parran* any right thereto whatsoever, but that the same should be sold and accounted for, under the authority of this court. In consideration whereof, &c. prayer for an application of the payments, injunction against proceedings at law, and for general relief, &c.

With the bill, the complainant filed the proceedings in equity, by *John Parran*, for the sale of the land, to pay the balance of the purchase money.

The answer of *John Parran* alleged and admitted, that in the month of December 1839, he did sell and dispose of, to a certain *James Tongue*, now deceased, a tract of land called "*Elkton Head Manor*," at and for the sum of \$8000. He also admits, that the said land, at the time of the said sale, contained a large quantity of wood, with a small proportion of timber, but denies that it was covered with large quantities of valuable timber; the wood on the said land, consisting then, as now, for the most part of pine and other descriptions of fire wood. This respondent also denies, that he allowed the said *T.*, to pay for the same in extended payments, or gave to the said *T.*, the credits on which said land was sold in consideration of an expectation, on the part of said *T.*, to pay for the said land from the proceeds of sales of the said wood and timber, and this respondent has no knowledge whatever of such expectation, if such ever existed, being known to the complainant, or of his reliance thereon, when he consented to become one of the said *T's* sureties, for a portion of the purchase money of said land; on the contrary, this respondent avers, that he, this respondent, never entered into any sort of agreement whatever, either with the said *T.*, or with the com-

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plainant, or with any other person or persons whatsoever, in relation to the payment of said purchase money, or any portion thereof, with the proceeds of said wood and timber; nor was there any understanding whatever, either express or implied, at the time of said purchase, or at any other time, between this respondent and the said *T.*, or any other person in relation thereto. This respondent admits, that the said *T.*, did execute a deed of trust, of the land so purchased by him from this respondent, to *Cephas Simmons* and *Richard Estep*, for the purposes therein mentioned; but this respondent denies, that said deed of trust was executed, with his consent, or that he was in any way privy, or party to the same, or that the said deed was made with the approbation of this respondent, as the complainant charges in his said bill. This respondent further answering, says, that he admits, that the said complainant became a surety for the said *T.*, for the sum of \$2000, parcel of the purchase money of said land, in two notes, each for the sum of \$1000, dated the 23rd December 1839, and payable, the first of said notes, on the 1st January 1841, with interest from the 1st January 1840; and the second of said notes, payable on the 1st January 1842, with interest as aforesaid. He also admits, that *Henry C. Drury, of William*, became a surety of said *Tongue*, on two others of said notes, for said purchase money, each for the sum of \$1000, of same date, and payable, the first of said notes, on 1st January 1843, as charged in said bill, and the other of said notes, payable on the 1st of January 1847, and not at the time, charged in said bill. He also admits, that a certain *John S. Skinner*, became the surety of said *T.*, in three other of said notes, for the said purchase money, the first of which became due on the 1st January 1844, each of them bearing the same date as aforesaid, and each for the sum of \$1000. The second of said notes, is payable 1st January 1845, and the third is payable 1st January 1846, and not as the complainant charges in his said bill, due and payable after the payment of the other notes aforesaid. In addition to the aforesaid notes, this respondent avers, that he also took from the said *T.*, four separate notes,

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each for the sum of \$250, without any security whatever, dated 18th March 1840, and payable, the first, one year after date, the second, eighteen months after date, the third, two years after date, and the fourth, three years after date, all bearing interest from date, for the balance of said purchase money, all of which aforesaid recited notes, amount to the sum of \$8000, the whole amount of the purchase money for said land. The complainant makes no reference whatever, in his said bill, to the last mentioned four notes of the said *T.*; but this respondent avers, that they are a portion of the notes, which were executed by the said *T.*, to him, for the aforesaid purchase money of said land. This respondent further answering, says, that the said *J. T.*, departed this life, intestate, in *Calvert* county, about the time charged in the said bill; and he also admits, that *Gideon G. Tongue*, *James Tongue*, and *Thomas R. Tongue*, are his only children, and sole heirs at law, and that there hath been no administration whatever granted on his personal estate. And this respondent avers, that the said *J. T.*, at the time of his death, was wholly insolvent, and unable to pay his debts, and this respondent having no other security for the payment of his aforesaid claim, except his lien on the land aforesaid, and the security afforded by the notes aforesaid, admits, that shortly after the death of the said *T.*, and about the time stated in the complainant's bill, he did file his bill of complaint, in this court, against the heirs and trustees aforesaid, for the sale of the aforesaid land, to pay the claim aforesaid, for the purchase money thereof. And that a decree was passed by this court, for the sale thereof, in the manner, and at the time charged in the complainant's bill. That *Jonathan Pinkney, esq.*, was appointed the trustee, to sell said land, and that on the 9th day of April last past, this respondent became the purchaser thereof, at the sale thereof, made by the said trustee, for the sum of \$4000, he being the highest bidder for the same. That said sale was, in all respects, conducted fairly, and this respondent has complied with the terms of said sale, by executing his notes to the trustee aforesaid, with approved security, for the payment of the said

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purchase money, according to the terms of the said decree, as stated in the complainant's bill. This respondent further answering, admits, that the first of the notes aforesaid, executed by the said complainant and *Tongue*, for \$1000, and which became due as aforesaid, on the 1st January 1841, hath been fully paid and satisfied; but he denies that he ever has attempted, in any shape or form, to compel the said complainant, to pay him the said note a second time, or that he has refused to credit him for the same. This respondent also admits, that the sum of \$300 has been paid on the second of said notes, and that in addition thereto, the complainant paid the sum of \$100.38, on the 21st October 1842, on account of, and in part of said second note, but this last payment was made to the late *Somerville Pinkney, esq.*; and this respondent avers, that he informed the said complainant, before he filed his said bill of complaint, that he should have credit for both of said last mentioned sums, whenever he would come to a settlement with this respondent; and this respondent wholly denies, that he ever attempted, by a forced sale or in any other manner, to deprive the said complainant of the benefit of said credits; on the contrary, this respondent avers, &c.

This respondent, further answering, says, that in consequence of the waste and injury committed on the land sold by him to the said *Tongue*, by cutting down of wood, timber, &c., and the depreciation which has taken place since that time in the value of real estate in *Maryland*, the said land was not worth more than the price agreed to be paid by this respondent, at the sale, by the trustee aforesaid; and this respondent apprehends, that at least one-half of the original sum of \$1000, for which he sold it to said *Tongue*, will be lost or put in imminent peril, unless the sum for which it was sold to this respondent, by the trustee, is applied, by this court, to the payment of that portion of the said purchase money, for which the said *Tongue* was alone responsible, to wit: the sum of \$1000, with interest, and the sum of \$3000, for which a certain *John S. Skinner* alone was surety, and in consequence of this apprehension on the part of this respondent, he directed

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the said trustee, *Jonathan Pinkney*, at the time this respondent purchased said land to make that application, (if it were possible for him to do so,) of the said purchase money. For the sum of \$1000, with the interest due thereon, this respondent took no security from the said *Tongue*; and for the sum of \$3000, this respondent took as security, *John S. Skinner, esq.*, who, at that time, was living in the State, and thought to be in good circumstances, but since then, has removed from the State, and now lives in another jurisdiction, and believed to be not in a very solvent condition, as this respondent has been informed, and believes, so that your respondent insists, that equity and a faithful observance of the sanctity and integrity of contracts require, that such an application should be made of the said sum of \$4000, so as aforesaid agreed to be paid by this respondent for said land, as will ensure to this respondent, the payment in full, of his original purchase money, due him as aforesaid, from the said *T.* and his sureties. Your respondent therefore insists, that his aforesaid purchase shall be applied to the payment of the \$1000, due from the said *Tongue*, individually, for which he has no security; and in the second place, to the payment of that portion of the said debt of *Tongue*, on which *John S. Skinner* is surety, the security being at least, extremely doubtful. And this application of said purchase money, this respondent humbly prays may be made by this court, that being the only application of it which will enable him to realize his entire claim. That portion of this respondent's claim secured by the complainant, and the said *Drury* being, in the estimation of this respondent, entirely solvent. This respondent denies that he has, by any act of his own, not warranted or sanctioned by law and equity, placed the primary fund for the payment of the debt of the principal debtor, beyond the reach of the complainant, as surety. If, by this allegation, the complainant means, that by his filing his bill for the sale of said land, and his becoming the purchaser thereof, under a decree of this court, he has placed the land, itself, beyond the reach of the complainant, it is most true, that such is the result, but this respondent

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insists, that such a result is not his act, but the act of the law, and one which the complainant could easily have prevented, by his attending the sale, and either buying the land himself, or seeing that it sold for its real value; if, in his judgment, this respondent's bid was under its real value, which is not pretended, however, by the complainant in his bill, &c.

The Chancellor, (BLAND,) upon the motion of the defendant, *Parran*, after his co-defendant had filed his answer, dissolved the injunction, and the complainant, *R. Welch*, of *Benj.*, appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and SPENCE, J.

By RANDALL and ALEXANDER for the appellant, and
By T. F. BOWIE for the appellees.

ARCHER, J., delivered the opinion of this court.

The doctrines in reference to the application of payments, have been elaborately examined by the solicitors; but we apprehend, that so far as regards the interests of the respondent, in the proceeds of sale, referred to in the proceedings, he can have no interest in these questions. As a vendor of the land, he had, as his security, his lien for the purchase money, and the notes given by *Tongue* with the security of the complainant, *Drury* and *Skinner* furnished additional security. He is surely entitled to full payment from the one security, or the other; or if one is insufficient, from the other. Unless this was the object of the parties, why was the security taken? The land may be deteriorated in the hands of the vendee, by neglect, mismanagement, or waste, or by the depression of lands in the market; to guard against such possible results, security is asked, that the vendor shall in all events be safe, and obtain his purchase money.

Now, it is asked, that the proceeds of the sale of the lands, which do not exceed more than one half of the purchase money for which the land was originally sold, should be applied either to the first note which falls due, or rateably applied

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to all the notes. The consequence of such an application might be, that the vendor would lose the very object which it had been his design, and the design of the parties to secure; one half the purchase money may be insufficiently secured, and that half may be on the last notes that are due. If, therefore, the application is made to the *first* notes that are due, the vendor loses one half his purchase money, and the same will be the result, in the like circumstances, if there should be a rateable application of the proceeds among the securities.

The case before us is unlike the case of a payment made by the vendee. The property has been sold upon which the vendor had his lien, and the sale has established the fact, that the vendee's equitable right in the land, was without any value; the sale not having produced a sum sufficient to pay the vendor's equitable lien. The product of the sale should be applied under the direction of the Court of Chancery, in such a manner as would give security to the vendor, which could be done, in this case, by enquiring into the pecuniary condition of the sureties. If any one of the sureties should be found insolvent and unable to pay, then the Court of Chancery would secure the vendor, by applying so much of the proceeds of sale as would extinguish the obligation thus endangered. In no other manner could justice be done to the vendor. If instead of a sale of the land, the equitable right of the vendee had been alone sold, the case would then have stood in the same condition as if the vendee had made a payment on the land, and we should then have been called upon to determine, among the sureties, the proper and legal application of the purchase money.

Time may be occupied in ascertaining the condition of the sureties. Shall the complainant be compelled to stay his collection of the obligations given him for the purchase money, until these enquiries be made? As they become due we think he has a right to enforce their payment, and such of the sureties as pay may be subrogated to the rights of the vendor, to the extent of any interest they may be ascertained to have in the purchase money.

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It may, on investigation, be ascertained, that some one or more of the sureties may be insolvent, in which event there would be nothing to which the complainant could be subrogated; and it may eventuate, that all are solvent, and able to pay; should this be the fact, then the proceeds of sale, after payment of the unsecured notes, should be rateably distributed in extinguishment of the obligations to which there are sureties.

We are of opinion, the Chancellor was right in dissolving the injunction. It appears that the credits claimed on the judgments, the vendor was willing to have made, and direction had been given to that effect. On this ground therefore, there would have been no foundation for the injunction; and as the credits have now been actually given, no injustice can be done the appellant by affirming the decree.

DECREE AFFIRMED.

M. A. GIST AND T. P. SCOTT, ADM'RS OF WILLIAM GIST,
vs. THOMAS DRAKELY.—December 1844.

Upon the back of the notes of a corporation under its seal, payable to the order of K., he and G., endorsed their names, over which D., an assignee for value, wrote as follows: "For value received, we jointly and severally promise D., to pay him the amount of the within, should the *Company* make default in the payment thereof." On proof that the *Company* gave the notes in the course of their business, and G., their debtor, credit in account for their amount, demand of payment from, and refusal by the *Company*, and immediate notice to G., in an action of *assumpsit* by D. against C., HELD, he was entitled to recover.

The right of action was not on the sealed instrument, but on the endorsement, a collateral or distinct contract.

Upon negotiable paper, the holder can only write over the signature of the endorser, such an endorsement as conforms to the nature of the instrument, viz: to point out the person to whom the bill or note is to be paid.

In actions upon notes *not* negotiable, the intention of the parties is to be considered, and effect is to be given to that intention, if no rule of law is violated.

When a defendant, for a valuable consideration, agreed to become, and by endorsing a note or single bill, *not negotiable in point of law*, designed to

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become security for the money expressed in it, he is responsible for its payment.

Parties to contracts are assumed to know the liabilities imposed on them by the law, and juries are not from evidence to infer, their ignorance of such liability.

Where a corporation executes a note which its charter does not authorise, the payee may, for value, stipulate with a third party that it shall be paid, and will not then be permitted to urge the invalidity of the *Company* to make it. He was capable to bind himself to pay the debt, if it should not be paid at maturity

The rule of *Baltimore* county court, which requires that the whole testimony intended to be produced by plaintiff and defendant shall be offered, before any question of law is raised, except objections to the competency of testimony, is such a rule as that court has power to make.

When a party fails to offer any evidence, at the time he ought to have offered it, under the foregoing rule, this court will not assume that it was then out of his reach, or was afterwards discovered.

The observance of such rule may be dispensed with, by consent.

APPEAL from *Baltimore* County Court.

This was an action of *trespass on the case*, brought on the 26th *August* 1842, by the appellee, against *William Gist*, the intestate of the appellants, who died pending the action.

The plaintiff declared,

1st. Upon the instruments given in evidence, as negotiable notes, endorsed, failure to pay, and notice, &c.

2nd. Upon the common counts.

3rd. Upon the notes of the *Eutaw Company*, given in evidence, assigned by *David Keener*, for value to the plaintiff. And whereas also, heretofore, to wit, on the first day of June, in the year of our Lord, eighteen hundred and forty-one, at the county aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, would receive from the *Eutaw Company* a certain writing, obligatory of the said *Eutaw Company*, sealed with its seal, the date whereof, is the day and year in this count aforesaid, whereby said *Eutaw Company* promised to pay, six months after the date thereof, to the order of *David Keener*, \$1826.81, for value received; and by the said *David Keener*, after the making and sealing thereof, and before the same became due and payable, to wit, on the day and year in this count aforesaid, to wit, at

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the county aforesaid, ordered to be paid and assigned to the said plaintiff, by assignment in writing, signed by the said *David Keener*, who was then and there authorised to make the same, at and for the sum therein specified, and give such value therefor; he, the said defendant, then and there undertook, and faithfully promised the said plaintiff, to pay him the said sum of money in the said writing obligatory specified, upon default of the said *Eutaw Company*, so to do, when the said sum of money in the said writing obligatory specified, should become due and payable. And the said plaintiff avers, that he, confiding in the said last mentioned promise and undertaking of the said defendant, afterwards, to wit, on the day and year in this count aforesaid, did actually receive from the said *Eutaw Company* the said writing obligatory, at and for the sum therein mentioned, and gave such value therefor, to wit, at the county aforesaid. And the said plaintiff in fact saith, that the said *Eutaw Company* did not, when the said sum of money in the said writing obligatory specified, became due and payable, to wit, on the first day of December, in the year eighteen hundred and forty-one, or at any other time before or afterwards, pay the same, or any part thereof, to the said plaintiff, but wholly neglected and refused so to do, and made default therein, to wit, at the county aforesaid, (although the said *Eutaw Company* was requested by the said plaintiff so to do, to wit, on the day and year last aforesaid, to wit, at the county aforesaid,) of all which said premises, the said defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. Yet the said defendant, not regarding his said last mentioned promise and undertaking, but, &c.

4th. In the further consideration, that the said plaintiff, at the special instance and request of the said defendant, would receive from the said *Eutaw Company* a certain other writing obligatory of the said *Eutaw Company*, sealed with its seal, the date whereof, is the day and year in this count aforesaid, whereby the said *Eutaw Company*, promised to pay, six months after the date thereof, to the order of *David Keener*, \$826.81, for value received; and by the said *David Keener*, after the

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making and sealing thereof, and before the same became due and payable, to wit, &c., ordered to be paid and assigned to the said plaintiff by assignment in writing, signed by the said *David Keener*, (who was then and there authorised to make the same,) at and for the sum therein specified, and give such value therefor, he, the said defendant, then and there undertook and faithfully promised the said plaintiff, to pay him the said sum of money, in the said last mentioned writing obligatory specified, upon default of the said *Eutaw Company* so to do, when the said sum of money in the said last mentioned writing obligatory specified, should become due and payable. And the said plaintiff avers, that he, confiding in the said last mentioned promise and undertaking of the said defendant, afterwards, to wit, did actually receive from the said *Eutaw Company* the last mentioned writing obligatory, at and for the sum therein mentioned, and gave such value therefor, to wit, at, &c. And the said plaintiff in fact saith, that the said *Eutaw Company*, did not, when the said sum of money in the said last mentioned writing obligatory specified became due and payable, to wit, on, &c., or at any other time before or afterwards, pay the same or any part thereof to the said plaintiff, but wholly neglected and refused so to do, and made default therein, to wit, &c., (although the said *Eutaw Company* was requested by the said plaintiff so to do, to wit, &c.,) of all which said premises, the said defendant, afterwards, to wit, &c., had notice.

5th and 6th counts were similar to the 4th count.

The defendant pleaded *non assumpsit*.

The jury found a verdict for the plaintiff.

1ST. EXCEPTION. The plaintiff to support the issue on his part, offered in evidence the two sealed bills, or notes and protests, following:

"\$826.81. *Baltimore*, June 1st, 1841. Six months after date, the *Eutaw Company* promise to pay to the order of *David Keener*, \$826.81, for value received. Witness the seal of the company, attested by the signature of the president,

(Seal.)

DAVID KEENER, *President*.

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"4th December 1841. Pro't. non-pay't., H. S. S., n. p., due $\frac{1}{4}$ Dec'r., E."

Endorsed, "DAVID KEENER," "WILLIAM GIST," "THO'S. DRAKELY," "B. F. GARDNER."

The notarial protest, dated 4th December 1841, shows that the above instrument was presented "at the place of business of the makers thereof, demanded payment of its contents, and received for answer, "it cannot be paid at present." "And that on the same day, the notary addressed a written notice to each of the endorsers of the said promissory note, informing them it had not been fully paid by the makers thereof, and that they severally would be held responsible for its payment, and left those for *David Keener*, *William Gist* and *B. F. Gardner*, at their respective places of business, and directed one to *Thomas Drakely*, *Wheeling*, *Virginia*, deposited it in the post office in this city.

"\$826.81. *Baltimore*, June 21st, 1841. Six months after date, the *Eutaw Company* promises to pay to the order of *David Keener*, \$826.81, for value received. Witness the seal of the company, attested by the signature of the president,

(Seal.) DAVID KEENER, *President*.

D. 1,016, Dec. $\frac{2}{4}$, 1841, Pro't. non-pay't. 24th Dec. 1841."

Endorsed, "DAVID KEENER," "WILLIAM GIST," "THO'S. DRAKELY," "W. & S. WYMAN."

The protest of this note showed a demand and non-payment as before, and also, notices for *David Keener*, and *W. & S. Wyman*, delivered to them. Notice for *Wm. Gist* and *Tho's. Drakely*, left at their places of business.

The hand writing of the drawer and endorsers thereon being admitted, having, before offering the same, filled over said endorsements, upon each of said bills, which were in blank, the words following, viz: "For value received, we jointly and severally promise *Thomas Drakely*, to pay him the amount of the within bill obligatory, should the *Eutaw Company*, the obligee therein named, make default in the payment thereof, when the same shall become due."

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The plaintiff further to support the issue on his part joined, proved by *William J. Cole*, a competent witness, that the single bills, hereinbefore inserted, were placed in his hands by *Mr. Drakely*, the plaintiff, for collection, some time before the institution of this suit; that soon after receiving them, he met *William Gist*, the defendant, and told him that he had the bills; *Gist* thereupon inquired of witness, whether they were some of those given for cotton? Witness replied, that he did not know, and asked *Gist*, what the *Company* wanted with cotton? to which he answered, for packing their machinery. He (witness,) further proved, that *Gist* (the defendant,) stated, in the same conversation, that *David Keener* and himself, had been appointed a committee, to raise money for the use of the *Eutaw Company*, and in consideration, that he would endorse said bills, with others, as the means of raising money for it, the *Company* agreed, to give him a credit upon the claims of the *Company* against him, he, the said *Gist*, being at the time, the debtor of the *Company*, to a considerable amount; that he did endorse said bills and others, for said purpose, under said agreement, and upon which money had been raised. The witness further proved, that in a second interview, between said *Gist* and himself, he, the witness, stated to said *Gist*, that he had examined the books of said *Company*, and found, that his indebtedness thereto, would cover all his liabilities incurred, to which *Gist* replied, that he thought he had gone further; that he intended to pay the bills in the hands of witness, but wished him to go against the *Company* and *Keener* first; and promised, that he would give witness a judgment, with a stay of execution, for the amount of the bills; that at a third interview, witness told *Gist*, (the defendant,) that *Keener* had consented to confess a judgment; *Gist* said he did not think he owed as much as he had become responsible for, on account of said *Company*, but that he would confess a judgment upon the bills; that *Gist* nevertheless, seemed to hesitate to make such confession, when witness left the bar. and order, for the judgment to be confessed, with *T. P. Scott, esq.*, *Gist's* attorney. Witness thinks, that *Gist* mentioned *Tiffany's* name,

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in connexion with the cotton. Witness further proved, that in his second interview with *Gist*, said *Gist* stated, that the *Eutaw Company* and *Keener*, had severally made deeds of trust of their property, for the benefit of their creditors; that this statement was made before the institution of the present suit.

The plaintiff then offered in evidence the judgments, which, upon the said two single bills, he had obtained against *Keener* and the said *Eutaw Company*, in *Baltimore* county court.

“*Baltimore* county court, September term, 1842. *Thomas Drakely, vs. David Keener*. Case, &c. 23rd December 1842. Judgment by confession for \$4,000, damages in nar. and costs; to be released on payment of \$1657.12, with interest, from 24th December 1841, and costs. Plaintiff’s costs, \$8.03½.

Test, THOMAS KELL, Clerk.”

“*Baltimore* county court, January term, 1843. *Thomas Drakely vs. the Eutaw Company*. Case, &c. 2nd January 1843. Judgment by confession for \$4,000, damages in nar. and costs; to be released on payment of \$1657.12, with interest, from 24th December 1841, and costs. Plaintiff’s costs, \$7.83½.

Test, THOMAS KELL, Clerk.”

Whereupon, no evidence being then offered, on the part of the defendant, the plaintiff offered to the court the following prayer:

If the jury shall find from the evidence, that the single bills, upon which the present suit is brought, were executed by the *Eutaw Company*, and endorsed by *David Keener* and *William Gist*, by an agreement with said *Company*, for the purpose of raising money thereon, or purchasing goods, and with a view, by said endorsements, of giving a credit to said *Company*; and if they shall further find, that *William Gist*, the defendant, undertook and agreed with said *Company*, to make such endorsement, in consideration, that said *Company* would give him a credit for the amount of his responsibilities thus assumed, upon a claim of said *Company* against said *Gist*; and shall further find, that when said single bills became due, payment was demanded, and refused by said *Company*, and that notice thereof was given to said *Gist*, the defendant, on

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the days shewn by the protests in evidence in this cause, that then the plaintiff is entitled to recover the amount of said bills, with interest, from the time the same became due.

The defendant offered to the court the following prayers:

1. That the plaintiff is not entitled to recover, under the *first* count in the nar. because the bills offered in evidence, are not promissory notes.

2. That the plaintiff is not entitled to recover, under the counts for work and labor, &c., or for materials furnished, &c., because there is no evidence, that the plaintiff performed any work and labor for the defendant, or furnished any material, as charged in said counts.

3. That the plaintiff cannot recover under the count for goods sold and delivered, because there is no evidence in support of said count.

4. That the plaintiff cannot recover under the money counts, because there is no evidence, that the plaintiff lent any money to the defendant, or that the defendant received any money for the plaintiff.

5. That if the jury believe from the evidence, that the defendant, when he wrote his name upon the back of the bills offered in evidence, intended to assume the responsibility of an endorser, of a commercial negociable instrument, in the order in which said bill was endorsed, and that the plaintiff so understood the said intended contract when he received said bills, then the plaintiff cannot recover in this suit.

6. Because there is no evidence of any agreement or authority from the defendant, with the plaintiff, under or by which, the plaintiff can write the guarantee, proposed to be written by him, over the name of the defendant.

7. Because there is no evidence of any contract, between the plaintiff and defendant in this cause, and the promise and undertaking of the defendant, offered in evidence by the plaintiff, was a *nude pact*, and void for want of present consideration when it was made.

8. Because the promise of the defendant, to pay the said writing obligatory, if the jury shall find such promise, was a

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promise and undertaking, to pay and answer for the debt of another person, and there is no evidence, that the agreement and consideration for such promise, was made in writing, and signed by the said defendant.

9. Because the contract offered in evidence, is essentially different and variant from the contract declared on.

10. Because there is no evidence, that the plaintiff used due diligence, to collect the debt mentioned in said writing obligatory.

11. Because the only evidence offered by the plaintiff, to charge the defendant, is evidence of a joint contract and responsibility, by *Keener* and *Gist*, and it being in evidence, that the plaintiff has recovered judgment against *Keener*, the obligation of the said *Gist*, if it ever existed, has been discharged.

12. That the assignment of the said bills, by *Gist* to the plaintiff, not having been made in conformity with the provisions of the act of 1763, ch. 23, sec. 9, the plaintiff cannot recover against the defendant *Gist*, the assignor.

13. If the jury believe from the evidence, that the writing obligatory, offered in evidence by the plaintiff, was made and put in circulation, for the purpose of raising money for the use of the *Eutaw Company*, then the plaintiff is not entitled to recover, because the *Eutaw Company* had no power or authority under its charter, to make, issue, or put in circulation, the said writing obligatory, and the pretended contract, was merely void, and the promise of the defendant, if the jury should find such promise, is void for want of consideration.

14. If the jury believe from the evidence, that the bills offered in evidence, were made by the *Eutaw Company*, and passed to the plaintiff, for the purchase of cotton, by the *Eutaw Company*, and for its use, from the plaintiff, then the plaintiff is not entitled to recover in this action, because the said *Eutaw Company*, had no authority to make such a contract.

The court, (PURVIANCE, A. J.,) granted said prayer, offered on the part of the plaintiff, and likewise, the 1st, 2nd, 3rd and 4th prayers offered on the part of the defendant, and rejected the 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th

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prayers, offered by the said defendant; to which opinion of the court to the jury, granting said prayer of the plaintiff, and rejecting said prayers of the defendant, the defendant excepted.

2ND EXCEPTION. At the trial of the above cause, the plaintiff having offered in evidence to the jury, the testimony stated in the first bill of exceptions, and no testimony being offered on the part of the defendant, the prayers stated in said first bill of exceptions, having been submitted by the plaintiff and defendant, and discussed before the court, and the court having pronounced an opinion and decision thereon, the defendant then offered to swear *David Keener, Philip H. Coakley and John J. Harrod*, for the purpose of proving, that the bills offered in evidence by the plaintiff, were made and endorsed for the accommodation of the *Eutaw Company*, and were taken and discounted by the plaintiff at an usurious rate of interest. To the right of the defendant, at this stage of the cause, to offer which said evidence, the plaintiff objected, and relied in support of his objection on the twenty-fifth rule of the court, and the court refused to permit said evidence, under the circumstances stated, to go to the jury. To which opinion and refusal, the defendant excepted.

It was agreed, that the charter of the *Eutaw Company*, may be read at the trial of this cause, in the Court of Appeals, from the printed statute books, and that the 25th rule of *Baltimore* county court, may be read from the printed rules.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MAGRUDER, J.

By LUCAS and T. P. SCOTT for the appellants, and
By J. H. B. LATROBE for the appellees.

MAGRUDER, J., delivered the opinion of this court.

The *Eutaw Company*, by two instruments, to which its corporate seal was affixed, promised to pay "to the order of *David Keener*," the sum of money expressed in each of them.

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On the back of these instruments, *David Keener* first, and afterwards *Gist*, (the original defendant in the court below,) wrote each of them his name. Before offering these sealed instruments in evidence, the blank that was left over their names, was filled up with these words. "For value received. We jointly and severally, promise *David Drakely*, to pay him the amount of the within writing obligatory, should the *Eutaw Company*, the *obligees* therein named, make default in the payment thereof, when the same shall become due." Upon this, the present suit was brought.

The court below, at the instance of the appellee, instructed the jury, that he was entitled to recover in this suit, the amount of said bills, if the same were executed by the *Eutaw Company*, and endorsed by *Keener* and *Gist*, by an agreement with said *Company*, for the purpose of raising money thereon, or purchasing goods, with a view by said endorsement, of giving credit to said *Company*; and if they should find, that the defendant (in the court below,) undertook and agreed with said *Company*, to make such endorsement in consideration, that the said *Company* would give him a credit for the amount of said responsibilities thus assumed, upon a claim of said *Company*, against said *Gist*; and shall further find, that when said single bills became due, payment was demanded, and refused by said *Company*, and that notice thereof was given to said *Gist*, on the days shown by the protests in evidence, in this cause. Of this instruction the appellants complain.

Upon what grounds is it asked of us to say, that the court below erred in giving this instruction?

It was frequently assumed, in the course of the argument, that sealed instruments are the causes of action in this case, and authorities were cited to prove, that instruments of that description, if left blank, could not be filled up by the owner of them. But, this action is grounded not upon the promises of the *Eutaw Company*, which are to be found only in sealed instruments, but upon alleged written promises of the defendant, in the court below, to which there were no seals. Many of the cases therefore, with a reference to which, we have been

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furnished, afford us no information, with regard to the law of this case. Those alleged promises, although on the same piece of paper, may be collateral to, or distinct from, and no part of the obligations of the *Eutaw Company*.

Much stress was, in the course of the argument, laid upon the circumstance, that the obligations of the *Eutaw Company*, were not promissory notes, or negotiable paper; and it seemed to be conceded, that if they had been instruments of that description, the defendant in error, would have been entitled to recover; the authorities, however, would not appear to lead us to this conclusion. Chancellor *Kent* says, (3 *Com.*, p. 59, 1st edit.,) no other use can be made of a blank endorsement, on a note or bill of exchange, in filling it up, than to point out the person to whom the bill or note is to be paid. In the case of *Moies vs. Bird*, 11 *Mass. Reports*, 436, *Justice Parker*, pronouncing the opinion of the court, said: "Had the notes been made payable to him, and negotiable in its form, the plaintiff would have been restricted to such an engagement, written over the signature, as would conform to the nature of the instrument. In such case, the defendant would have been held as endorser, and in no other form, for such must be presumed to have been the intent of the parties to the instrument." But this note was not made payable to the defendant, and was therefore, not negotiable by his endorsement. What then was the effect of his signature? It was to make him absolutely liable to pay the contents of the note. He puts his name upon a note, payable to another, in consequence of a purchase made by his brother, in a day or two after the bargain was made, knowing that he could not be considered in the light of a common endorser, and that he was entitled to none of the privileges of that character. He leaves it to the holder of the note, to write any thing over his name, which might be considered not to be inconsistent with the nature of the transaction. In *Seabury vs. Hungerford*, 2nd *Hill's N. Y. Rep.* 80, the court say, "when a contract cannot be enforced, in the particular mode contemplated by the parties, the court, rather than to suffer the agreement to fail altogether, will, if possible, give effect to it in some other way."

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This is an attempt to charge the defendant with the amount due on two obligations; because of an endorsement thereon of his name in blank, and of course, the obligation is not, speaking technically, a negotiable instrument. *Justice Story*, in his able work on the law of promissory notes, page 587, speaking of notes, with the name endorsed in blank thereon, says, "these cases have been either, *first*, where the note was not negotiable, or *second*, where it was negotiable," and then adds: "In the former class of cases, it has been held, that if the blank endorsement was made, at the same time as the note itself, the endorser ought to be held liable, as an original promisor or maker of the note, and that the payee is at liberty to write over the signature, 'for value received, I undertake to pay the money within mentioned to B,' the payee."

It is not the duty of this court to say, upon how much less proof, than was offered by him, the plaintiff, in the court below, might have recovered the amount of his claim. He might perhaps, have regarded this as a contract, like that spoken of by the *Supreme Court of the United States*, in the case of *De Wolf against Rabaud and others*, 1st Peters, 476, "a trilateral contract, each as an original promise, though the one may be deemed subsidiary, or secondary to the other, a credit not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors, upon co-existing contracts, forming parts of the same general transaction." It may be, that the plaintiff below, might have filled up the blank somewhat differently, and thereby, have dispensed with the necessity of offering some of the proof which he adduced, but it is not perceived, that the blanks are filled up, otherwise than as the holder of the notes, was at liberty to fill them up, or that the defendants have any cause to complain of the insertion of any word, which, consistently with the nature of the transaction, might have been omitted.

Indeed, in order to sustain this decision of the court below, it is not necessary to rely on very modern decisions. The principles settled by the case of *Russell vs. Langstaff*, Doug. 514, and the various cases in the books, (see 2nd H. Blac.

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298, *note*,) brought upon bills, payable to a fictitious payee, *or order*, would seem to be sufficient for our purpose. If in cases like those now spoken of, such objections to a recovery were over-ruled, it is difficult to come to a conclusion, that they can be fatal objections to a recovery in this suit. In the first case, (that in *Douglass*,) the defendant endorsed several notes, all of them at the time blank; that is, without any sum, date, or time of payment, mentioned in the notes. The defendant's counsel, in the case, might well say, that by the signature, the defendant *contracted for no given sum*; that notes, without sum or date, were waste paper, and might insist, that the declaration, which alleged a pre-existing note, made previous to the endorsement, was at war with the facts of the case. *Lord Mansfield* however held, that it was a clear case, in favor of the plaintiff.

In the suits upon notes, or bills, payable to a fictitious payee, or order, it was strenuously argued, that the *Law Merchant*, forbade notes payable *to order*, to be treated as notes payable *to bearer*. The court however, decided, that if the rules of law prevented the instrument from operating, according to the words used therein, it may be stated in such a manner, that the law will give effect to them. The intention of the parties is to be considered, and effect is to be given to that intention, if no rule of law is thereby violated. In this case, we must not doubt, for the defendant below admitted to the witness, and the jury have, by their verdict found, that the defendant in the court below agreed for a valuable consideration, to become, and by endorsing them, designed to become security for the money expressed in each instrument.

It appears by the bill of exceptions, that the jury were put in possession of acknowledgments by *Gist*, (the defendant below,) that he and *Keener*, were to raise money for the *Eutaw Company*; and of his further acknowledgments, that in consideration of his, (*Gist*,) endorsing the bills, the *Company* agreed to give him credit upon the claims, which it had against him, (he being at the time, the debtor of the *Company*;) that he endorsed the bills in fulfilment of said agreement, and upon

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the bills so endorsed, money was raised. By the terms of the contract, then, between the *Company* and *Gist*, (for which the latter received a valuable and ample consideration,) he was bound to become security for the payment of those bills of the *Eutaw Company*, and this, before any person was the owner of them; and moreover, that he was to become such security, by the endorsement of, (or writing his name on) them. Surely upon such testimony, (which the jury were to believe,) the appellee was entitled *ex æquo et bono*, to demand of the defendant below, the amount of notes, the payment of which, to the holders of them, was to be secured by his endorsement, and the amount of which, was to remain in his own hands, in order to save him from any possible loss. The man who becomes a party to such a contract, for such a purpose, and for such a consideration, is forbidden, by every thing like reason and justice, to deny, that the appellee became the owner of the bills at his special instance, and because of his undertaking to pay the holder of them their amount, if default was made by the makers of them. Surely, of such a transaction it may be said, as was said by *Baron Hotham*, in *1st H. Blac. Reports*, 584, “unless some *stubborn* rule of law stand in the way of the present judgment, it ought to be supported.”

Immediately following the prayer of the appellee, we read in the bill of exceptions, that “the defendant offered to the court the following prayers.” These prayers, (fourteen in number,) are nearly all of them points, which might be legitimately insisted upon by the counsel, whose duty it was in the court below, or in this court, to argue, that the court ought not to give the instruction, of which we have already spoken. Upon a few of them, some remarks will be made.

The fifth was properly rejected. It required the court to assume, that the parties *might* not have known, that single bills were not such commercial, negotiable instruments as promissory notes, or might not know, what was the liability which the defendant below assumed, when he endorsed them. The law requires us to assume, that the parties did understand the contract into which they entered, and the liability which

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the defendant below assumed. It would have been improper to authorize the jury, to infer from the evidence the existence of such ignorance among the parties, and if so, to instruct them that if it existed, the verdict must be for the defendant.

With respect to the thirteenth, and the next point, (which may be considered in connection with it,) they seem to assume, that if the *Eutaw Company* had no authority (to be found in its charter,) to make those writings obligatory, then the defendant could not oblige himself, to pay to the holders of them, the sums of money expressed in either of them. It is thought, that it did not lie in the mouth of the defendant below, to make such an objection. He was capable of binding himself to pay the debts, if when they became due, they remained unpaid.

In regard to the supposed speculation in cotton, the testimony (derived from the defendant below,) was, that the cotton purchased, was "for packing their machinery." By this, it can only be understood, that it was purchased to pack, in order to send away, the articles in which the *Company* was authorized by its charter to deal. For such a purpose, the *Company* was surely authorized to buy cotton upon credit as well as for cash, and might give its bonds as well as the verbal promise of any of its members, or its officers, for payment of the purchase money.

For reasons, which have already been suggested, we think there is no error in the refusal by the court to give the other instructions, which were not given.

There is another exception taken by the plaintiff in error, of which we will now dispose.

A rule of *Baltimore* county court, then existing, commenced in these words. "The court will require in all cases, that the whole testimony intended to be produced by both plaintiff and defendant, shall be offered before any question of law is raised, except objections to the competency of testimony." In this case, after all the points submitted by the defendant, as well as plaintiff, had been decided by the court, the defendant offered to introduce other testimony. The plaintiff objected to its introduction, "at this stage of the cause," relying on

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the rule of court above mentioned, and the court “refused to permit the testimony, under the circumstances stated, to go to the jury.” Was there error in this refusal, for which an appellate court ought to reverse the judgment of the court below?

This court has heretofore (*Wall vs. Wall*, 2 H. & G. 82,) said, “there exists no discretion in an inferior court, to dispense, at pleasure, with their own rules, or to innovate upon established practice; and a party injured by such a course, has an undoubted right to seek redress in this court. Every suitor is interested in the interpretation of the rules of court, applicable to his case; and an erroneous judgment of the county court in relation to them, may in many cases be as vitally injurious to him, as a wrongful judgment upon the law, which may govern his case.” Again, in the case of *Dunbar vs. Conway*, 11th G. & J. 97, “this court has always regarded a legitimate rule of a court, as prescribing a law to the court. The proper office of such a rule, is to establish fixed and settled practice, to which the court is required to conform, and any error of opinion, in respect to its legal effect, or to its application to a particular case, will entitle the party injured to redress by appeal.” It is believed, that the power of this court, in acting upon appeals of this description, as well as the duties of the court below, in regard to the observance of its own rules, are accurately defined in the above extracts, from its former decisions; and that a plaintiff in error, who brings such a complaint as this before us, must show that he is authorized by these former opinions of the court, to prefer such a complaint against the court below. Rules of court, adopted for the dispatch of business, and the impartial administration of justice, must be written, so that all may understand them, and when adopted, must be a law to the court, as well as to others. But it can never be a question in this court, whether a rule adopted by any inferior court, is just such a rule, as in the opinion of this court, or a majority of its members, ought to be adopted in preference to any other rule, calculated and designed to accomplish the same object.

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It cannot be alleged, that in this case, the court dispensed with its rule, or changed its practice. The question then must be, had the court power to make such a rule, and because of its existence, deprive the defendant of an opportunity of introducing testimony, at a time, when according to the rule, it was inadmissible?

It appears by the record, that the defendant below had not previously offered any testimony. This however, is unimportant, as it must be taken for granted, that he had declined to offer any, at the time when the rule of court required or permitted it to be offered. The testimony offered, if it had proved the fact for which it was offered, might have rendered wholly unnecessary a discussion of the very many points of law, upon which the defendant below, seemed to the court, to be disposed to rest his case. Why this testimony was not offered at an earlier stage of the trial, is not shown. We cannot, therefore, assume, that at the time when he ought to have submitted it, according to the rule of court, it was out of his reach, or was afterwards discovered.

A court constituted as this is, would necessarily feel reluctant to entertain the question, what rules would be the best for, and therefore ought to be adopted by, the courts of any one of our judicial districts.

How long the parties shall be at liberty to introduce fresh testimony, or at what stage of the trial this privilege shall cease, it is proper that a rule of court should determine; and yet, it is not to be believed, that any rule for that purpose, which can be devised, would be equally proper for every district.

There may be reasons, oftentimes, why either party, and especially the defendant, should be permitted to settle the law of the case, before he consumes the time of the court, in examining witnesses, whose testimony may afterwards be found to be wholly unnecessary. But, who is to be the judge of this, in any particular case? Certainly not the party himself. He may suggest this course, with his reasons for preferring it, and if the court and his adversary approve of it, none would

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say, that the observance of the rule might not be dispensed with. But ought such a course to be pursued, if the court, when the reasons for preferring it are made known, thinks, that the rule ought to be adhered to?

It is very much in favor of the rule under consideration, that it was adopted as a rule for city business, at least fifteen years ago, and yet, that it is now for the first time, it is believed, a subject of complaint in this court.

JUDGMENT AFFIRMED.

JEREMIAH BENNINGTON, vs. SAMUEL DINSMORE, ADMINISTRATOR OF SAMUEL DINSMORE.—*December, 1844.*

Upon the single bill of *B.*, dated 20th July 1827, promising to pay the "*heirs, administrators or assigns, of the estate of D., deceased,*" an action was commenced by the administrators of *D.*, on the 8th February 1839. The writ was regularly renewed from term to term, until November term, 1839, when it was suggested, that the said letters of administration had been revoked and granted anew to *S.*, who sued out another writ, in his own name, to the next succeeding term; which being returned *non est*, and regularly renewed for several terms, he then procured an attachment. This was levied and returned. The defendant, now, gave special bail and appeared, and the last administrator declared against him on the single bill, specially stating the revocation of the first letters. **HELD:** That it was uncertain, upon the face of these instruments, to whom they were to be delivered, or in whose name a suit must be brought; that no action could be brought on them; and, that limitations were a bar to the action.

Where there are more writs than one, it must appear, that they are regular continuances of each other, to except the case from the act of limitations.

Writs issued in the name of *S.*, administrator of *D.*, cannot be regular continuances of writs issued by *G.*, administrator of *D.*; though the authority of the latter had been revoked.

APPEAL from *Harford County Court.*

This was an action of *debt*, brought on the 8th February 1839, by *Jane Dinsmore* and *Thomas H. Gillispie*, administrators of *Samuel Dinsmore*, late of *Harford county*, deceased, against *Jeremiah Bennington*, in a plea that he render unto

them the sum of \$66.42, which he unjustly detains from them, &c.

Another writ, like the first, was sued out same term, and both were returnable to the 3d Monday of May 1839. These writs were returned "*non est*," and were then ordered to be consolidated, and another writ for both the debts mentioned in the first writs, was sued out on the 17th June 1839, returnable the 3d Monday of November of that year. This was also returned "*non est*."

The record then recited that, whereas, since the issuing of the writ aforesaid, the letters of administration of the said *Jane Dinsmore* and *Thomas H. Gillispie* have, by the *Orphans* court of *Harford* county, been revoked, and letters of administration of all and singular, the goods and chattels, rights and credits which were of the said *Samuel Dinsmore*, late of *Harford* county, deceased, by the said *Orphans* court, were granted and committed to *Samuel Dinsmore*, as by the suggestion of the said *Samuel Dinsmore* has been stated. Therefore, you are hereby commanded to take the said *Jeremiah Bennington*, late of *Harford* county, yeoman, if, &c., and him, &c., so that you have his body before, &c., on the 3d Monday of May next, to answer unto *Samuel Dinsmore*, administrator of, &c., of *Samuel Dinsmore*, late of *Harford* county, deceased, in a plea that he render unto him the sum of, &c. Issued the 16th January 1840.

This writ was renewed on the 28th May 1840, again on the 2nd December 1840; again, on the 18th October 1841; and again, on the 14th May 1842, and all returned *non est*.

At May term 1842, the plaintiff filed a short note, showing his cause of action, a copy of which was made out and delivered to the sheriff of *Harford* county, aforesaid, thereon endorsed, to wit, "to be left at the house where the said *Jeremiah* did last reside." The sheriff to whom the said short note was, in form aforesaid delivered, returned the same: "The short note, of which this is a true copy, was left at the residence of *Jeremiah Bennington* on the 27th day of September 1842."

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And thereupon the said plaintiff, to make proof of his action aforesaid, files in court here the copies of the writings obligatory, with an affidavit thereunto annexed, and which are as follows, to wit:

Harford county, Md. We, or either of us, do promise to pay to the heirs, administrators or assigns, of the estate of *Samuel Dinsmore*, deceased, the just and full sum of \$66.42, lawful money, for value received. Witness our hands and seals, this twentieth day of July 1827.

\$66.44.

JEREMIAH BENNINGTON, (Seal.)

MARY BENNINGTON, (Seal.)

Test,—*William C. Kirkwood, John A. Kirkwood.*

Ture copy—test, HENRY DORSEY, Cl'k.

Harford county, Md. We, or either of us, do promise to pay to the heirs, administrators, or assigns of the estate of *Samuel Dinsmore*, deceased, the just and full sum of \$66.42, lawful money, for value received. Witness our hands and seals, this twentieth day of July 1827.

\$66.42.

JEREMIAH BENNINGTON, (Seal.)

MARY BENNINGTON, (Seal.)

Test,—*William C. Kirkwood, John A. Kirkwood.*

True copy—test, HENRY DORSEY, Cl'k.

Samuel Dinsmore, adm'r of *Samuel Dinsmore*, deceased, vs. *Jeremiah Bennington*. In *Harford* county court, May term, 1842. 8th non. est.

City of *Baltimore*, to wit: Be it remembered, that on this 5th day of October, in the year 1842, before me, the subscriber, a justice of the peace of the State of *Maryland*, in and for the city aforesaid, personally appeared *Samuel Dinsmore*, administrator of *Samuel Dinsmore*, deceased, and plaintiff in the above action, and made oath on the Holy Evangely of Almighty God, that *Jeremiah Bennington*, the above named defendant, is justly and *bona fide* indebted to him, the said *Samuel*, as administrator of said *Samuel Dinsmore*, deceased, in the sum of \$132.84, with legal interest thereon from the 20th day of July 1827, over and above all discounts. And the said *Samuel*, administrator as aforesaid, at the same time

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produced the office copies of the two bills obligatory, (the originals whereof, are filed in the said county court, in the case of the judgments heretofore rendered in said court, in favor of the administrators of said *Dinsmore*, deceased, against *Mary Bennington*, the co-obligor in said bills obligatory,) on and by which the said *Jeremiah* is so indebted, which said copies of the bills obligatory, are hereto annexed. In testimony whereof, I do hereto subscribe my name the day and year first above written.

JOHN W. PEALE.

On this proof, the county court, on the 8th October 1842, awarded an attachment against the said *Jeremiah Bennington*, which, at November term 1842, was returned: "laid as per schedule in defendant's possession, and defendant summoned;" which schedule, mentioned in said return of said sheriff, is as follows, to wit, &c.

The defendant then appeared, gave special bail, and the court dissolved the attachment, and the plaintiff filed his declaration, setting forth the said single bills, according to their tenor, and then alleged, that the said defendant then and there delivered the said two writings obligatory to a certain *Jane Dinsmore* and *Thomas H. Gillispie*, they then and there being the administrators of the said *Samuel Dinsmore*, deceased, by the *Orphans* court of *Harford* county, before that time duly constituted and appointed. The said plaintiff further avers, that after the making of the said two writings obligatory, to wit, on the day of in the year eighteen hundred and the *Orphans* court aforesaid, did revoke the letters of administration, so previously granted to the said *Jane Dinsmore* and *Thomas H. Gillispie*, on the estate of the said *Samuel*, deceased. And thereupon, letters of administration upon the estate of the said *Samuel*, deceased, were, by the *Orphans* court aforesaid, in due form of law committed to the said plaintiff, who thereupon became entitled to demand and receive from the said defendant the said several sums of money mentioned in the said two writings obligatory. Nevertheless, the said defendant, although often requested, hath not yet paid the said two sums

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of money, or either of them, or any part of either of them, either to the said former administrators of the said *Samuel*, deceased, or to the said plaintiff, administrator as aforesaid, nor has he paid the same or any part thereof, to any or either of the heirs or assigns of the said *Samuel*, deceased, but to pay the same or any part thereof, to either of the said parties above mentioned, the said defendant has hitherto wholly refused and still refuses, to pay the same to the said plaintiff, as administrator as aforesaid. Whereupon, &c.

The parties then agreed to submit the cause aforesaid to the court here, upon the following statement of facts, to wit:

Stated case. It is admitted, that in the year 1826, *Samuel Dinsmore*, the elder, died, and that *Jane Dinsmore* and *Thomas H. Gillispie* were appointed his administrators. That while they were administrators, the defendant, on the 20th day of July, 1827, executed and delivered to the said *Jane* and *Thomas* the two bills obligatory, mentioned in the declaration. That on the 8th day of February 1839, the said *Jane* and *Thomas*, as administrators of said *Dinsmore*, sued out a writ against said defendant on said bills obligatory, which was not served, but returned "*non est*," and was renewed to the succeeding term, and again returned *non est*. That after the issuing of said writ, to wit, on the day of the letters of administration of the said *Jane* and *Thomas H.* were revoked, and administration of the estate of the said *Samuel*, deceased, granted to the plaintiff, who sued out a writ against defendant on the 16th of January, 1840, to the term immediately succeeding that to which the last mentioned writ had been so returned, which writ was regularly renewed. That the writs referred to are in the case, and make part of this statement. That the said *Samuel*, deceased, had no children, and was born an alien. That said plaintiff is a naturalized alien.

It is agreed that limitations are considered as if pleaded. And if, upon the foregoing statement, the court shall be of opinion that the plaintiff is entitled to recover, then judgment to be entered for the plaintiff; but, if the court should be of opinion that plaintiff is not entitled to recover, then judgment

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to be entered for defendant. Either party to have the right of appeal, and all errors in the pleadings waived.

The county court rendered judgment for the plaintiff, for his debts &c., and the defendant prosecuted this appeal.

The cause was argued before DORSEY, CHAMBERS and MAGRUDER, J.

By REVERDY JOHNSON for the appellant, and

By OTHO SCOTT for the appellee.

MAGRUDER, J., delivered the opinion of this court.

This cause was submitted to *Harford* county court, upon a case stated. By this it appears, that *Samuel Dinsmore*, the intestate, died in 1826, and that the plaintiff in error, with another, on the 29th July 1827, executed two several instruments of writing, and thereby promised to pay "to the heirs, administrators or assigns," of the estate of *Samuel Dinsmore*, deceased, the sums of money expressed in them. Upon those instruments, suits were brought, first, in the name of *Jane Dinsmore* and *Thomas H. Gillispie*, administrators of *Samuel Dinsmore*, and upon a revocation of their letters, and the grant of others to the present appellee, before the arrest of the appellant, the last administrator issued a writ in his name, as administrator.

It is contended, that no judgment could have been rendered in favor of the plaintiff below, although the suits had been continued, as well as brought in the names of the first, who administered upon the estate, because of the uncertainty by whom the money may be demanded. And indeed, it is difficult to determine, who can be said to be the obligee? One would suppose not the administrators, to the exclusion of the heirs, nor the latter, rather than the former.

We are told, in *Bacon's Abridgment*, (*Title*, "*Obligations*,"") that an obligation of £200, to two, *solvendum*, the £100 to the one, and the other, to the other, is a void *solvendum*, and this because, although there may be several obligees, yet a person cannot be bound to several persons, severally. But in this case,

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it appears that the obligor is not to be bound to both, but to one or to the other, and to which more than to the other, the instruments themselves, do not instruct us. How is it to be ascertained, to which of them the obligations are to be delivered? or is a delivery to each necessary, in order to the validity of the instruments?

It may be, as was suggested in the argument, that those instruments furnish evidence of an indebtedness either in the life time of the intestate, or for property, a part of his estate sold since his death. If so, the administrators have still their right of action, but that right of action must not be an instrument of writing, which the debtor is at liberty to discharge by paying the money to the heirs, persons who have no right to receive or to release debts due to the estate.

It must be admitted, that separate suits cannot be brought upon each of these instruments of writing; the one in the name of the heirs, and the other in the name of the administrators, and a judgment be obtained by each, for the same money. Yet, if one be authorized to bring suit, surely an action of debt may be brought by the other, and the pendency of the action by one, could not be pleaded in bar, to the action by the other. There is no "certainty to a certain intent in general," in this case, and if "the creditors of *Henry M. Chew*" could not maintain an action upon the order of the court, set forth in the case of *Boteler & Belt vs. State, use of Chew, &c.*, in 8 *Gill & Johnson* 360, it would seem to follow, that the objection arising from the uncertainty in this case, to whom the instruments of writing are to be delivered, and in whose name a suit must be brought, must prove equally fatal in this case.

But if a suit could be instituted in the name of the administrators of the intestate, still the plea of *non accrevit infra &c.*, of which it is agreed, that the defendant shall have the benefit, would defeat the action. "Where there are more writs than one, it must appear that they are regular continuances of each other, *Norris' Peake*, 425, and the writs issued in the name of *Samuel Dinsmore*, administrator of *Samuel Dinsmore*,

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are not regular continuances of those sued out in the name of the original administrators.

JUDGMENT REVERSED, WITH COSTS.

THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAIL
ROAD COMPANY, *vs.* ZEPHENIAH BAYLESS.—Dec. 1844.

By the act of 1831, ch. 288, the *Baltimore and Port Deposit R. R. Co.* was chartered, to construct a rail road from *B.* to *P. D.* By the act of same year, ch. 296, the *Delaware and Maryland R. R. Co.* was also chartered, to construct a road from some point at the *Delaware* and *Maryland* line to *P. D.* By the act of 1835, ch. 293, the *D. and M. Co.* was united to the *Wilmington and Susquehanna R. R. Co.*, a company chartered by *Delaware* under that name. By the act of 1837, ch. 30, the first named company was united with the *W. & S. R. R. Co.*, under the name of the *Philadelphia, Wilmington and Baltimore R. R. Co.* The first named company was located in *Baltimore* and *Harford* counties; and as to the second, which lies in *Cecil* county, *Maryland*, "the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the State, except that portion of the permanent and fixed works of the company, within the State of *Maryland*, and that any tax which shall hereafter be levied upon said section, shall not exceed the rate of any general tax, which may, at the same time, be imposed upon similar real and personal estate, within this State, for State purposes." HELD :

- 1st. That the shares and stock of the *D. & M. R. R. Co.*, its works, improvements, profits, and machinery of transportation, except, &c., were exempted from all taxation or levies, whether for county or State purposes.
- 2nd. The permanent and fixed works of the *Company* remained subjects of taxation or assessment, either for county or State purposes, or for both by virtue of the said exception.
- 3rd. *The terms*, "that any tax, which shall hereafter be levied, shall not exceed," &c., have no reference to taxes or assessments on levies for county purposes; it relates, exclusively, to taxes laid for State purposes.
- 4th. The powers, &c., exemptions conferred by the act of 1835, ch. 293, as to county taxes, relate to *Cecil* county,
- 5th. A tax laid by the commissioners of *Harford* county, for county purposes, on the rails, bed of the rail road, and other property of the company, connected with its road in *Harford* county, and not upon the cars of said *Company*, was not forbidden by the charters referred to, and is within the general law relating to taxes.

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APPEAL from *Harford* County Court.

This was an action of *trespass* upon the case, brought on the 25th November 1842, by the appellee against the appellant, who declared, that whereas the defendants, on the 1st January 1842, to wit, at, &c., were indebted to the said plaintiff, as one of the collectors of taxes for *Harford* county, duly appointed by the board of commissioners of said county, in the sum of \$125, for taxes due the plaintiff, as collector as aforesaid, and being so indebted, they, the said, &c.

The parties agreed, that their case be docketted by consent, and submitted on a statement of facts, which admitted, that the claim in this case is for taxes levied and assessed by the commissioners of *Harford* county, for the year 1841, for the common and ordinary county charges, and not for State purposes. That the same was levied and assessed on the rails, bed of the rail road, and other property of said defendants, connected with its rail road, and absolutely necessary for the use and enjoyment of its rail road. That the plaintiff was regularly authorised, to collect all taxes, legally assessable, on the property of defendant.

That the several acts of Assembly, which relate to the incorporation and charter, are to be regarded as part of this statement, and to save the trouble of transcribing them, either party may read them from the printed statutes, to have the same effect as if they were transcribed into this statement.

It is further agreed, that if the court shall be of opinion on the foregoing statement, that the said property of the said defendant, is liable to be assessed for ordinary county charges, then judgment to be rendered for plaintiff, for \$118 and costs. But if the court shall be of opinion, that the said property of said defendant, is not liable to assessment and taxation for ordinary county charges, but the same is exempted from such assessment and taxation under its charter, then judgment to be for defendant; either party to have the right to appeal.

The county court rendered judgment for the plaintiff below, and the defendant prosecuted this appeal.

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In the Court of Appeals, the parties further admitted, that the property assessed in this case, lies in *Harford* county, and does not include the cars of the defendants; that the principle of valuation, adopted in making the assessment in this case, was to assess the buildings and the rails, as of the value they bore, irrespective of their being portions of the rail road, and the land as land, and not as of increased value, by reason of being used as a rail road; that the rate of county taxation, imposed by the commissioners of *Harford* county, in the property of said *Company*, varies from the rate of county taxation, imposed by the commissioners of *Baltimore* and *Cecil* counties.

The cause was argued before DORSEY, CHAMBERS and MAGRUDER, J.

By O. SCOTT, for the appellant, and

By YELLOTT, for the appellee.

DORSEY, J., delivered the opinion of this court.

The only question designed to be raised in the case before us, is, whether that portion of the permanent and fixed works of the *Philadelphia, Wilmington, and Baltimore Rail Road Company*, lying within the limits of *Harford* county, is subject to the payment of county levies or taxes, as they are sometimes called. That they are so, in common with all other property in the county, is conceded, unless exempted therefrom, by some legislative enactment upon the subject; and such enactment it is insisted, is to be found in the latter part of the 19th section of the act of the General Assembly of *Maryland*, passed at December session 1831, chap, 296, entitled, "an act to incorporate the *Delaware and Maryland Rail Road Company*," which declares, "that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in said *Company*, incorporated by this act, and their successors forever; and the shares of the capital stock of said *Company*, shall be deemed and considered personal estate, and shall be exempt

from the imposition of any tax or burthen, by the States assenting to this law, except upon that portion of the permanent and fixed works of said *Company*, which may be within the State of *Maryland*; and that any tax, which shall hereafter be levied upon said section, shall not exceed the rate of any general tax, which may, at the same time, be imposed upon similar, real or personal property of this State, for State purposes.” According to the true construction of this provision of the act of Assembly, we think, that by the first part of it, the shares of the capital stock of the *Company*, thereby created, its works, improvements, profits, and machinery of transportation, except its permanent and fixed works, which lay within the State of *Maryland*, were exempted from all taxation or levies, whether for county or State purposes. And that, as far as regards the said first part of said recited provision, such permanent and fixed works which lay within the State of *Maryland*, remained subjects of taxation or assessment, either for county or State purposes, or for both, in the same manner as if no such exemption had been inserted in the act of Assembly. That as to the succeeding part of the said provision, it has no reference to taxes or assessments on levies, for county purposes; and, therefore, in no wise, impairs the rights asserted by the appellee in the present action. That it relates exclusively to taxes laid for State purposes; and is to be construed in the same manner, as if the words “for State purposes,” which now stand at the end of the section, had been inserted after the words “any tax,” when it would read, and that any tax, for State purposes, which shall hereafter be levied upon said section, shall not exceed the rate of any general tax, which may, at the same time, be imposed upon similar, real or personal property of this State.

But, suppose we are wrong in the construction we have given to the portion of the act of Assembly referred to, what has that to do with the question now before us. That act of Assembly, related to the *Delaware and Maryland Rail Road Company*; the southern terminus of which road, was at the river *Susquehanna*. The powers and exemptions given

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by its charter to that *Company*, as regards matters of the character of those now in controversy, apply to *Cecil*, not *Harford* county. To determine the question now before us, we must look to the act of 1831, ch. 288, entitled, “an act to incorporate the *Baltimore and Port Deposit Rail Road Company* ;” not to the act of Assembly, for the incorporation of the *Delaware and Maryland Rail Road Company*. Under the first of these laws, you will look in vain for any such exemption, as that now claimed by the *Philadelphia, Wilmington, and Baltimore Rail Road Company*.

The acts of Assembly of 1835, ch. 93, and 1837, ch. 30, by which the *Wilmington and Susquehanna Rail Road Company*, and the *Delaware and Maryland Rail Road Company*, and the *Baltimore and Port Deposit Rail Road Company*, were united into one *Company*, by the name of the *Philadelphia, Wilmington, and Baltimore Rail Road Company*, confer no such exemption.

JUDGMENT AFFIRMED.

JAMES M. HOPKINS AND OTHERS, vs. ELIZABETH FREY.—
December 1844.

By the act of 1818, ch. 193, sec. 10, it is enacted: “that widows shall be entitled to dower in lands held by equitable title in the husband, unless the same be devised by a will, made before the passage of this act: but such right of dower shall not operate to the prejudice of any claim for the purchase money of such lands, or other lien on the same; and tenants by the courtesy, shall be entitled for life to lands held by equitable title, but not to the prejudice of any claim for the purchase money of such lands, or other lien on the same.”—HELD:

That the owner of the equity of redemption in fee, having mortgaged the same, prior to the passage of this act, and the same having been sold under a decree obtained upon such mortgage, his widow was not entitled to dower, as against the purchaser at such sale.

If the equity of redemption had not been mortgaged prior to the act of 1818, her right to dower thereout, could not be questioned.

There is nothing in the act of 1818 which authorises the opinion, that an equitable estate which had belonged to the husband, but had been mortgaged before the passage of that law, and sold in his life time, is an estate of which his widow could be endowed.

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The act refuses dower in an equitable interest in lands, if the same be devised by a will made before its passage, and cannot operate to the prejudice but of those creditors and heirs, who became such after its enactment.

APPEAL from the Court of Chancery.

On the 29th February 1840, the appellee filed her bill, alleging that she was the widow of *John Frey*, deceased. That the said *John Frey* was, during his life time, and during his marriage with the said *E. F.*, seized, in fee simple, of divers messuages, land and tenements, lying in *Cecil* county aforesaid, viz, a tract or parcel of land called "*Dixons Exchange*," one other tract called "*Hillis Delight*," and one other tract called "*Hillis Addition*," which several tracts or parcels of land, were conveyed to the said *John Frey* and a certain *Matthew Irvin*, by a certain *Jeremiah Brown*, by deed dated on or about the 8th July 1801. That the said *Matthew Irvin*, afterwards, to wit, on the 3rd November 1803, conveyed all his undivided moiety, estate, and interest, in and to the said several tracts of land to the said *John Frey*; that all said several tracts of land were sold during the life time of the said *John Frey*, and during their marriage, to a certain *James Hopkins*, of the State of *Pennsylvania*; that the said *James Hopkins* departed this life in the State of *Pennsylvania*, intestate, leaving the following children and heirs at law, namely, &c. That the said several tracts of land are now rented to and in the possession of a certain *Thos. H. Perdue & Co.*, of the number, names or residence of the persons composing said company, she is ignorant, and that said *Thomas H. Perdue* resides upon the premises, in *Cecil* county, *Maryland*. That the said *J. F.* was, in his life time, and during his marriage with her, seized, in fee simple, of another tract of land called "*Browns Inheritance*."

The bill then proceeded to set out the title to this tract, and other tracts, in relation to which no appeal was taken. And then stated, that her husband, the said *John Frey*, departed this life on the 26th December 1832, by reason whereof, she became entitled to her dower in the land and property aforesaid; that she never hath made any conveyance, assignment or other disposition of her said dower interest in

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or to said property, nor hath she committed or consented to any act, by which she could either legally or equitably be divested of the same. This complainant further states, that she hath frequently applied to the said *James M. Hopkins* and the other defendants, to assign to, and put her in possession of her dower interest aforesaid, which they, and each of them have always refused to do, &c. Prayer for an assignment of dower, and for rents and profits.

The answer of *James M. Hopkins* and *William Hopkins*, admitted, that it is true these defendants are two of the heirs at law of *James Hopkins*, deceased, and that the said *James Hopkins* died possessed of, and entitled to the lands and forge in *Cecil* county, called *Dixons Exchange*, *Hillis Delight*, and *Hillis Addition*; that the said *James Hopkins* died intestate, leaving the following persons his heirs at law, to wit, *James M. Hopkins*, *William Hopkins*, &c; that these defendants have understood and believe that the said *John Frey* and *Matthew Irvin*, named in said bill of complaint, did purchase from one *Jeremiah Brown*, the one undivided moiety of said lands herein before mentioned, and that the said *John Frey* and *Matthew Irvin* purchased the other moiety of said lands from one *Thomas Rogers*; that these defendants do not know when or at what time the said complainant was married to the said *John Frey*, and, therefore, do not admit that the said *John Frey* was, at any time during his marriage with the said complainant, seized in fee, of said lands. These defendants are informed and believe, and so state for answer to the said bill of complaint, that the said *John Frey* never was seized, in fee, of said lands, so as to entitle the said complainant to claim dower in the same; that the said *J. F.* and *M. I.*, at the time of their purchase of said property, conveyed the same, by way of mortgage, to *Thomas Rogers* and *Jeremiah Brown*, on 5th January 1802, to secure the purchase money, so that in fact, they, the said *F.* and *I.*, acquired but an equitable estate by their said purchase; that the said mortgage was not released or paid, so as to give a fee simple legal title to the said *J. F.* and *M. I.*, or either of them, up to the year 1816, when the said *J. F.*

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conveyed all his interest in said lands to *Jacob Frey* and others, to secure them from loss on certain liabilities they had incurred as the endorsers of said *John Frey*, on certain promissory notes, and under that conveyance, the said *Jacob Frey* and others, obtained a decree of this honorable court on the 3rd day of May 1823, for the sale of all the interest of the said *John Frey* in said lands, and all his interest therein was accordingly sold by one *Jeremiah Cosden*, the trustee named in said decree, as will be seen by the record of said decree, in the case of *Jacob Frey* and others, against *John Frey*, now remaining of record in this honorable court; that under and by virtue of the said sale, under said decree, the said *James Hopkins*, the father of these defendants, became entitled to the said lands. These defendants further shew, that at the time the said lands were sold under the decree aforesaid, they were of small value, &c.

These defendants, as they have before stated, aver, that they do not admit that the said *John Frey* ever had any legal title to said lands, but, on the contrary, state, that he had a mere equity of redemption, and that before he obtained a release of the mortgage to the said *Brown* and *Rogers*, so as to give him a legal title, he executed a second mortgage to *Jacob Frey* and others, and the said lands were sold under a decree so as aforesaid obtained on said last mentioned mortgage. Wherefore these defendants, for answer, aver, that the said complainant has no legal right to claim dower in said lands, &c.

After the coming in of the answers, a commission was issued, and proof of the various exhibits, proceedings in chancery, mentioned in the bill, answer and opinion, of this court, filed in the cause; and on the 27th January 1843, the Chancellor (*BLAND*,) decreed, that the said *E. F.* was entitled to dower, and ordered a commission to assign the same, being of opinion, that it having been declared that widows shall be entitled to dower in land held by equitable title in the husband, it necessarily follows, as has, in some respects, been distinctly specified in the same law, that such title can only be affected in like manner, as a title to dower in a legal estate; and that

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the facts in this case shew, that the widow is entitled to dower as directed to be assigned to her by the said decree.

From this decree, *James M. Hopkins* and others, appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MAGRUDER, J.

By OTHO SCOTT for the appellant, and

By C. McLEAN for the appellee.

MAGRUDER, J., delivered the opinion of this court.

The defendant in error, is the widow of *John Frey*, who died in the year 1832, and she filed this bill, in order to obtain a decree, directing dower to be assigned to her, in several tracts of land, and also, an account of the rents and profits of the same. The Chancellor having decreed, that she is entitled to dower, and to rents and profits, from the death of her husband, an appeal has been prayed, by some of the defendants, and it being here insisted, that in regard to the lands claimed by them, the widow has no title to dower. This is a question to be disposed of, before the claim to rents and profits can arise.

About the material facts, there is no controversy, and for the purpose of showing upon what grounds the claim to dower is maintained and resisted, the following statement is deemed to be sufficient.

In 1802, *Frey*, the husband, obtained title to the land, now in controversy in this court, and of which his widow seeks to be endowed, and executed a mortgage to secure the payment of the purchase money. In the succeeding year, (1803,) he married the defendant in error. In 1818, arbitrators, chosen by the mortgagor and mortgagee, awarded, that the payment of the sum mentioned in the award, should entitle *Frey* to a good and sufficient release of the mortgaged premises. Afterwards, the mortgagees filed in Chancery their bill, in order to obtain a sale of the mortgaged premises, and *Frey*, relying upon the award, the bill was dismissed in 1823, and that decree was affirmed by the Court of Appeals in 1825.

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In 1816, (before the award,) *Frey* mortgaged the equity of redemption to others, who afterwards filed a bill, and obtained a decree to sell the mortgaged premises, which were sold 15th July 1823, and from the purchasers at that sale, the plaintiffs in error, derive their title. *Frey* was, at the time of the sale, and for some years afterwards, alive.

If the equity of redemption had not been mortgaged by *Frey*, the widow's claim to dower could not be questioned. The award, in 1816, had ascertained, that at that time, a small balance was due, (when the debt was reduced to so small a sum, no where appears,) and the payment by him, of that sum, was necessary to entitle him to a re-conveyance of the mortgaged premises. But, before the date of the award, *Frey*, as has been already stated, mortgaged the equity of redemption, and the widow now claims dower in the mortgaged premises, from those to whom the equity of redemption was sold, in the life time of *Frey*. Can such a claim be maintained in Chancery?

Dower, (*Justice Story* remarks,) is a mere legal right, and a court of equity, in assuming concurrent jurisdiction with courts of law, upon the subject professedly, acts upon the legal right, (for dower does not attach upon any equitable estate.) In some of our sister States, the wife is allowed dower in an equity of redemption. In *England*, the law is different. "A widow, (says *Cruise*, 2 vol. 9 sect. p. 151, *Am. ed.*) is not allowed dower out of an equity of redemption of a mortgage in fee, upon the principle, that an equity of redemption is analogous to a trust estate." See also, *Dixon vs. Saville, and others*, 1st *Brown's Ch. C.*, 326. Our State adheres to the *English* law, upon the subject of dower, except when, and so far as it may be changed by our legislature. In the case of *Ford, and others, against Philpot, and others*, decided in 1821, (see 5 *Harr. & John*. 312,) the court, in pronouncing its opinion, said, "no right of dower can arise, (and for this exception, no substantial reason can be given, and now no longer exists,) on the mortgagors' interest." The words, "and no longer exists," evidently allude to the act of 1818, ch. 193, sec. 10, and the next enquiry is, does this law authorize the claim of dower in a case like this?

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It is a sufficient answer to this claim, when it is attempted to establish it by this act of Assembly, to say the law was passed after the execution of the mortgage. There is nothing in the words of the law, nor in any supposed design of those who enacted it, which would justify us in concluding, that an equitable estate, which had belonged to the husband, but had been mortgaged before the passage of the law, and sold in his life time, is an estate of which the husband's widow could be endowed. Surely this would not be a sound construction of a law, which expressly refuses dower in an equitable interest, "if the same be devised by a will, made before the passage of this act," and which, too, is careful to provide, that to entitle her to dower in any equitable interest, it must be "held by equitable title in the husband."

The words, it is believed, are sufficiently explicit, to prevent the law from operating to the prejudice of the rights of any, but creditors, heirs, and the devisees in a will, made, after its passage.

Decree to be reversed, bill dismissed, (as far as it seeks relief against the plaintiff in error,) and with costs in this court, and the Court of Chancery.

DECREE REVERSED AND BILL DISMISSED.

THE GEORGIA INSURANCE AND TRUST CO. *vs.* F. DAWSON
AND P. T. DAWSON.—*December 1844.*

Upon a valued policy on cargo, *tin*, shipped, or to be shipped, "at and from *New York to Baltimore*," the assured may recover a partial loss, for damage by sea water, caused by the perils of the seas, though the tin was not properly dunnaged and stowed.

Underwriters are liable for a loss, the *proximate* cause of which, is one of the risks enumerated in their policy, though the *remote* cause may be traced to the negligence of the master and mariners.

The liability of the ship owner to the shipper for the negligence of the master and crew, cannot avail the insurer as a defence. Upon payment of the damage, the insurer may be subrogated to all the rights of the insured against the person answerable for bad stowage and dunnage.

The act of 1832, ch. 280, is not repealed by the act of 1834, ch. 89. The latter gives to the creditors of foreign corporations an additional remedy.

APPEAL from *Baltimore* County Court.

This was an attachment commenced on the 9th October 1840, by the appellees against the appellants, upon the following contract of insurance, viz :

“Policy No. 31. Insured \$3,500. *Baltimore*, 11th November, 1837. In consideration of the sum of seventeen dollars, fifty cents, *the Georgia Insurance and Trust Company* do hereby insure *William Dawson and Co.*, and whom it may concern, against all risks to the amount of thirty-five hundred dollars, on three hundred boxes tin valued thereat, shipped, or to be shipped on board the schooner *Edward Vincent*, at and from *New York* to *Baltimore*, according to order of this date. *John G. Proud & Co.*, agents. \$3.500 at one-half per cent., \$17.50. Policy 50 18.”

It was accompanied with a statement of particular average, showing damage to \$994.27, and the usual affidavits against the defendants, a company not incorporated by the State of *Maryland*.

The defendants appeared by consent, and pleaded *non assumpsit*. The jury found a verdict for the plaintiffs. The defendant moved in arrest of judgment generally.

At the trial of this cause, the plaintiffs, to maintain the issue on their part, offered in evidence to the jury, that being the owners of three hundred boxes of tin, at *New York*, they shipped the same on board the schooner *Edward Vincent*, for *Baltimore*, and proved their bill of lading for the same.

That the defendants being an insurance company, chartered by the *State of Georgia*, and not chartered by the laws of this State, but transacting business, and holding and exercising franchises in this State, by its agents *John G. Proud* and *Francis H. Smith*, who are and were citizens of the State of *Maryland*, resident in the city of *Baltimore*, and acting as such agents under the firm of *John G. Proud and Company*, insured the said tin upon the said voyage, by the aforesaid policy. That on the said voyage, the said schooner encountered gales and storms, which caused her to leak badly ; and on the arrival of the said schooner at *Baltimore*, the said tin

was found to be damaged by salt water, in consequence of the said storms and gales, to the amount claimed by the plaintiffs.

The defendants, to maintain the issue on their part, offered in evidence to the jury, that the said tin was stowed upon sand ballast, and badly and insufficiently dunnaged, and that the risk upon said tin thus stowed, was greater than if the stowage and dunnage of the same had been usual, sufficient, and proper.

The plaintiffs, in order further to maintain the issue on their part, offered in evidence to the jury, that the stowage upon sand ballast, was usual and customary; and that the stowage and dunnage of the tin in this case was good and sufficient. Whereupon the defendants prayed the court to instruct the jury:

1st. If the jury shall believe from the evidence, that the damage done to the tin insured, was owing to the neglect of the master in improperly stowing and dunnaging the same, then they must find for the defendants; although they may also believe that the injury done to the tin was occasioned by contact with salt water, introduced by leakage of the vessel, which leakage was occasioned by storms and gales.

2nd. If the jury shall believe from the evidence, that the stowage and dunnage of the tin insured, was such as to expose it to more than ordinary risk, then they must find for the defendant, unless they shall also believe that such risk was in the contemplation of the parties at the time of effecting the insurance.

3rd. If the jury believe from the evidence, that owing to the negligent and improper manner in which the tin in controversy in this case was stowed and dunnaged, the schooner *Edward Vincent* was not sea-worthy for the safe transportation of the tin against leakage, and the ordinary perils of the sea, upon the voyage from *New York* to the port of *Baltimore*, then the plaintiffs are not entitled to recover in this case, notwithstanding the jury may believe that the said schooner was sea-worthy in other respects.

Which instruction, as asked in the *first* and *third* prayers, the court, (MAGRUDER and PURVIANCE, A. J.,) refused to grant; and as asked in the *second* prayer, the court refused, so far as it was in conflict with the instruction asked by the plaintiff's prayer.

And the plaintiffs prayed the court to instruct the jury, "If the jury believe, that at the inception of the voyage the schooner *Edward Vincent* was tight, staunch, and strong, and properly officered, manned, and equipped, having a competent master and crew; and if the jury further find, that on the voyage of said vessel from *New York* to *Baltimore*, through storms and perils of the sea, the tin in question was damaged and injured to the extent claimed by the plaintiffs in this case, that plaintiffs are entitled to recover, although the jury believe that the dunnage of said vessel and cargo was negligently fixed and arranged by the master and mariners of said vessel, and that such negligent fixing and arranging of the cargo, was the remote cause of its loss."

Which instruction the court gave. To which refusal and instruction by the court, the defendants excepted.

The defendants prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MAGRUDER, J.

By ST. GEORGE W. TEACKLE for the appellants, and
By GLENN for the appellees.

MAGRUDER, J., delivered the opinion of this court.

The defendants in error, being about to ship a quantity of tin from *New York* to *Baltimore*, the plaintiff in error undertook, for the premium agreed upon, to insure the same to the amount of \$3,500, shipped, or to be shipped on board the schooner *Edward Vincent*, at and from *New York* to *Baltimore*.

On the voyage, the vessel encountered gales and storms, which caused her to leak badly, and the tin insured was discovered, on its arrival at *Baltimore*, to be damaged by salt water, in consequence of the gales and storms, which the ves-

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sel encountered, and for the amount of the damages done to the property insured as aforesaid, this action was brought.

These facts are not denied, but the plaintiff in error resists the claim, upon the ground that the tin insured was stowed upon sand ballast, and badly and insufficiently dunnaged, and that the risk was greater, than if the stowage and dunnage of the same, had been usual, sufficient, and proper. These facts too, the points which were raised, in the court below, require us to assume.

A verdict having been obtained by the defendants in error, a motion in arrest of judgment was made, and this because, as was contended, the remedy which is given against foreign corporations by the act of 1832, ch. 280, is taken away by a subsequent law, passed in 1834, ch. 89. This motion was properly over-ruled. The latter gives, and was designed to give, to the creditors of such corporations, an additional remedy, and cannot be interpreted to deprive the defendant in error, of the remedy which the previous law afforded to him.

The questions which remain to be decided, are presented by the bills of exceptions, taken in the progress of the trial, by the plaintiffs in error.

On the part of the defendant, it is contended, that the damage done to the tin, was occasioned by the perils of the sea, and that the gales and tempests, which the vessel encountered, being the proximate cause of the loss, they are entitled to recover, even although his adversary has found in wrong stowage and dunnage, what is called a remote cause of such damage.

Much of controversy has arisen upon the question, which is here presented, and by many it has been insisted, that although the loss be occasioned by any of the perils mentioned in the policy, yet the insurer is not liable, if there can be found another and remote cause of the loss, and it can be ascribed to misconduct, or negligence of the captain and crew, the same not amounting to barratry. Chancellor *Kent*, in the chapter of his *Commentaries*, which treats of the law of insurance, (in the edition of 1828,) refers to decisions,

for and against the insurer, and adds: "It may be expedient to suspend our own judgment, under such a sad uncertainty of the law, and leave the question for further judicial investigation, since an eminent judge of the Supreme Court of the *United States*, (*Justice Story*,) has thought proper to take this course." A number of decisions, both in *England* and this country have, since then, taken place on this once very vexed question, and in 1837, (*see 11th Peters 220*,) *Justice Story* said, that in the case, *10 Peters 507*, "the court thought, that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against, is within the protection of the policy, notwithstanding, it might have been occasioned remotely by the negligence of the master and mariners. We see no reason to change that opinion; and, on the contrary, upon the present argument, we are confirmed in it." In these two cases, (*10 & 11 Peters*,) are cited most of the *English* cases, in which the question was decided. The reported decisions of some of our sister States, furnish other cases, establishing the same doctrine, and this court can feel no disposition, in deciding this case, to depart from the rule *stare decisis*. It is to be understood then to be the settled law of *Maryland*, "that the underwriters are liable for a loss, the proximate cause of which, is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners."

It is however contended by the plaintiff in error, that the cases referred to do not settle the law of this case; that these cases only establish, that a policy, which being once attached, is not discharged by reason of the remote cause of the loss or damage sustained by the assured, but in the case now under consideration, the question is, whether the policy ever attached? The reason of this distinction, however, between this and the other cases is not perceived. The policy is on a cargo, shipped, or to be shipped on board of a vessel, *at and from New York to Baltimore*. If the policy had said not "at and from," but "from *N. York to Baltimore*," the risk would have commenced only when the vessel broke ground; but as the lan-

guage here used, is "*at and from New York to Baltimore,*" it is understood, to "include all the time the ship is in port, after the policy is subscribed, and the goods are on board, &c."

The owners, &c., of the vessel, it is said, are the agents of the assured, and are answerable to the shippers for any damage, which is the consequence of bad stowage. This may be so, but still we are told, 2 *Barn. & Ald.* 82, that "a loss, whose proximate cause, is one of the enumerated risks in the policy, is chargeable to the underwriters; although the remote cause may be traced to the negligence of the master and mariners." The act of insuring, is the voluntary act of the insurer; he can prescribe the terms on which he will underwrite; may undertake as few or as many risks as he pleases, and in the policy of insurance, may, if he thinks proper, insert such clauses as will secure him against all liability, if the stowage and dunnage be not as they ought to be. If there be no such express warranty on the part of the owner of the cargo, still the underwriter may rely on the implied warranty, and is discharged, if the warranty express or implied, will exonerate him. Now, it is not pretended, that in this case the underwriter can claim to be discharged, by any express warranty. Does the implied warranty furnish him with a defence? By effecting a policy, whether it be on the ship, freight, or cargo, or the commissions or profits, to accrue upon the cargo, *the assured* is always understood to warrant, that the ship is sea-worthy, or the materials of which the ship is made, its construction, the qualifications of the captain, the number and description of the crew, the tackles, sails and rigging, stores, equipment and outfit generally, are such as to render the ship, in every respect, fit for the voyage insured. *Phillips on Insurance*, 113. (*Am. edit.*, 1823.) The policy implies the seaworthiness of the ship. *To render a ship seaworthy*, it must be staunch, and of sound materials, or rather, it must be sufficiently staunch and sound, for the employment or situation intended by the insurance. *Phillips* 113. The author then proceeds to explain, that this relates to the beginning of the risk, that the breach of the warranty, discharges the underwriter from all subsequent

liability; that the vessel must be of proper construction, must have sufficient stores and supplies, must have a skilful master and competent crew, and a competent pilot, where it is customary to take one, but no where tells us, that this warranty *ex vi termini*, implies any thing, with regard to the stowage or dunnage of the vessel, which it certainly would be unreasonable to expect, that the owners of the articles insured, would attend to.

But it is said, that the liability of the insurer does not commence, until the articles insured are placed as they ought to be. In *3rd Kent*, 310, (*3rd edit.*.) the doctrine is not so laid down.

There would seem to be no good reason for this, as it is generally understood, that afterwards, and even after the vessel has left the port for some time, it is the right, and generally the duty of the master, to arrange the cargo differently, to *trim* the ship; and it is not contended, that because of a mistake then committed, the underwriter must be discharged.

The owners of the ship, it is said, are answerable to the shipper, for any damage in consequence of bad stowage. It does not thence follow, that the underwriter is discharged. If damages are to be recovered, because of the manner in which goods on board of a vessel are stowed away, it would seem to be but right, that in the action, which is to decide whether the damage was the result of bad stowage, the owner should be the party defendant, and that such a question should not arise in an action, upon the policy of insurance; and who is so fit a person to be the plaintiff in the action, to recover damages for any such negligence or unskilfulness, as the insurer himself, who by relying on such a defence, proves, that he is in possession of the proof, and if there had been no subsequent loss or damage of the articles insured, might have retained the premium, and concealed the damage occasioned by the bad stowage, which perhaps, lessened the value of the article when sold? If the insurer be, *as he alleges*, in possession of proof, to fix the loss of the cargo upon the owner or captain, he becomes entitled, upon payment of the amount of

he loss or damage, to stand in the place of the owner, and to be subrogated to all his rights against the person answerable for bad stowage or dunnage.

The conclusive answer however, to all that was urged on this subject, is to be found in the decisions alluded to, in *England* and *America*, and which have established, that in case of loss, the consequence of the negligence or fault of the assured, their agents or servants, the underwriters will be liable, provided the proximate cause of the loss or damage be one of the enumerated risks in the policy. The good effects which are anticipated by an adherence in such cases to the maxim, "*causa proxima, non remota spectatur*," would be entirely lost, if in an action upon the policy, the defendant might insist upon one, yet more remote than the remote cause, which it is settled, can furnish the insurer with no defence. In the case of *Waltron vs. Maitland*, 5 *Barnwell & Alde*. 174, the judge said, "no decision can be cited, wherein such a case, (the loss by a peril of the sea,) the underwriters have been held to be excused, in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule. It will introduce an infinite number of questions as to the *quantum* of care, which, if used, *might* have prevented the loss." *Justice Story*, in delivering the opinion of the court, in *Waters vs. Louisville Insurance Company*, observes, "if negligence of the master or crew were, under such circumstances, a good defence, it would be perfectly competent and proper to examine on the trial, any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence, in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage; for *all these* might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided, or escaped, or never encountered at all. *Under such circumstances, the chance of a recovery upon a policy, for any loss, from the peril insured*

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against, would of itself, be a risk of no inconsiderable hazard :'' and surely, this reasoning, applies to the case now under consideration, and to the defence which is relied on. Policies of insurance would seldom be contracts of indemnity, if, when the actual peril insured against has occurred, the payment of the loss depended upon every act, in regard to the property insured, which, by possibility, might have increased the risk of loss.

The court can discover no error, either in the instruction which was given, at the instance of the counsel, for the plaintiff below, or in the refusal to give the instructions, which were asked by the defendant below.

JUDGMENT AFFIRMED.

JOHN B. SEIDENSTRICKER vs. THE STATE OF MARYLAND.—
December, 1844.

By the act of 1st April 1841, ch. 23, imposing a direct tax of twenty cents in the hundred dollars, it was designed, that such tax should be paid into the treasury, and the collector's commissions, by the counties or cities respectively, making the levy, by an additional levy, and not by the treasury.

APPEAL from *Baltimore* County Court.

This was an action of *assumpsit*, brought to September term 1844, of said court, by the State against the appellant, as collector of State taxes for the city of *Baltimore*, for money collected. The defendant pleaded *non assumpsit*.

Judgment was rendered for the plaintiff, subject to the admission, "that there is a sum of money in the hands of the defendant, collected by him on account of taxes due under the act of 1841, but he claims to retain the same on the ground that he looks to the State for his commissions as collector, and has a right to retain for his commissions. The question is submitted to the court, whether the State or the city of *Baltimore* is to pay the defendant his commissions. It is agreed,

that a *pro forma* judgment for \$100 may be entered in favor of the plaintiff, with the right to the defendant of appealing to the Court of Appeals, to have said question decided there, and judgment entered there in accordance with the opinion of the court.”

The defendant accordingly prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MAGRUDER, J.

By T. P. SCOTT and MARSHALL for the appellants, and
By STEELE, D. A. G., for the State.

CHAMBERS, J., delivered the opinion of this court.

The sole question in this case is, whether, by the true interpretation of the act of 1st April 1841, ch. 23, imposing a direct tax, the twenty cents in the hundred dollars, thereby directed to be levied, included the commission allowed to collectors, or whether such commissions were to be paid by an additional levy.

The 62nd section directs the counties to defray all expenses not *provided for* by the law. The only provision which could be contemplated, must have been a provision for the payment of such expense. If an expense *provided for*, is taken to be an expense which the act directs to be incurred, then all the expenses incident to the execution of this law are provided for. Thus the 27th section directs the clerks of the levy courts to perform certain duties, for such compensation as the said courts may deem proper. The 47th section directs the collectors to perform certain duties for a compensation, (not less than three, nor more than six per centum on the monies paid by him,) to be fixed by the said levy courts. In neither is it expressly said, out of what fund shall the compensation be taken. Is the expense in the one case *provided for* by the act, and not in the other? The 46th section makes it the duty of the collectors to collect certain proportions of the tax on or before certain specified days; and the 47th section requires them, on the same days, to pay over to the collector all

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monies collected, or which ought to have been collected on those days respectively, evidently intending, that the payment should be of the proportions of the assessment, which proportions were, in the contemplation of the legislature, aliquot parts of the *whole* assessment.

Some reliance has been placed on the language of the 47th section, which gives the commission on the money "paid into the treasury," and not on the amount collected; but it will appear, by reference to the 45th section, that so far as relates to the counties for which collectors are, by the act appointed, the per centum allowed for commission, appears to be allowed as to some, on the amount paid over, and as to others, on the amount assessed, in cases where it was quite impossible to design thereby, any difference in the fund from which they were to be paid.

We think it clear, from all the sections referred to, that the act designed the clear sum of twenty cents in the hundred dollars to be paid into the treasury.

JUDGMENT AFFIRMED.

ELIZABETH TYSON *vs.* ROBERT MICKLE, AND OTHERS.—
December, 1844.

The trustees appointed by decree to sell real property, on the 21st June 1841, and 12th October 1842, offered it at public sale without success. A minimum price was then agreed on by the parties, and the property offered at private sale, without avail. The trustees and parties concerned, then agreed to sell, at private sale, for a fixed sum, if that could be obtained, and after unusual efforts, a purchaser was procured at that sum. Under such circumstances, as the Chancellor would have authorized the sale in the absence of all proof to impeach it, he properly ratified it, though one of the parties to the cause objected to it, as a sacrifice of his interest.

When a trustee exercises a power, which, if previously applied for, would have been granted, as it were, as a matter of course, a court of equity, in the absence of proof showing the inexpediency and injustice of so doing, will ratify the act done in the same manner as if the requisite authority had been applied for, and granted.

The report of a sale made by trustees of the court, and their answers to a petition impeaching their sale, must be credited, until over-ruled by proof.

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Where a will devising real property authorized its sale upon the consent of the testator's widow, her consent, to a decree for the sale, is a sufficient compliance with the requisition of the will.

Improvement in price, arising from a general enhancement in value since the sale, is no ground for setting aside a sale made under a decree.

The ratification or rejection of a sale must depend on the state of circumstances existing at its date, not on subsequent contingencies; depreciation of property is at the risk of the purchaser, and he must reap the fruits of appreciation.

APPEAL from the Court of Chancery.

On the 25th March 1841, the appellant, by her next friend, *Thomas Tyson*, with others, filed their bill in Chancery against the appellees, praying a sale of certain real estate. After answers filed, on the 18th May 1841, the Chancellor decreed a sale of the property for such part of the purchase money in cash and on credit, as the trustees appointed by the decree should decide upon.

On the 18th March 1842, the trustees reported, that owing to the extreme depression of the property, they had not yet been able to sell, nor did they think that any future effort to make sale thereof, at the present time, would be prudent. That there is a large quantity of iron attached to the building upon the said property, and lying about the premises, and used in the construction of the machinery thereto, which is daily becoming of less value, and which, it is represented to your petitioners, it would be to the interest of all parties to dispose of at once, by a separate sale from the rest of the real estate; wherefore, your petitioners pray that they may be empowered by order of court, with the consent of the parties interested, to dispose of the said iron and machinery at once, and by a sale separate from the rest of the property. This petition the Chancellor dismissed.

On the 19th December 1843, the trustees, *Robert Mickle* and *G. L. Dulany*, reported to the Chancellor, that after giving bond with security, &c., they did, in pursuance of notice, attend on the premises, at *Ellicotts Mills*, on the 21st June 1841, at twelve o'clock, and then and there proceeded to offer the said real estate for sale, when not obtaining a bid, the

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property was withdrawn, and offered at private sale; but not being able, in this way, to dispose of it, it was again offered at public auction, upon the terms and at the place aforesaid, on the 12th October 1842, after a longer notice than required by the decree had been given, &c., when the highest bid made for said property was \$12,150. That the trustees, in conformity with the understanding existing between them and the other parties interested, including *Thomas Tyson*, the father and guardian of the infant, *Elizabeth Tyson*, that said property should be limited to \$15,000, refused the said bid and again offered (advertised,) it at private sale, and made unusual exertions to obtain a purchaser on favorable terms, without success; when it was thought advisable by the trustees and parties interested, to sell the said property for \$10,000, if so much could be obtained for it; that the assent of the said *Thomas Tyson*, father of the said infant, *Elizabeth*, is contained in a letter filed with the report marked A, and dated the 4th April 1843, and that said *Tyson*, between two and three months since, called upon one of the trustees, *Robert Mickle*, and expressed his desire that the property should be sold for the above sum. That the trustees, although they made every effort to dispose of the said property, could not obtain an offer for it even to the amount of \$10,000, until they were offered that sum on the 4th of December 1843, by *W. P. Jenks*, which they accepted, and sold the said property to said *Jenks* for the sum of \$10,000 in cash, on the final ratification of the sale, as will appear by the written contract of sale herewith filed. That said sale is approved of and desired by all parties interested, except the said *Tyson*, as will appear by their prayer, contained in paper B.; that since said sale has come to the knowledge of said *Tyson*, and notwithstanding his previous assent that \$10,000 should be taken for said property, he objects thereto, and says it ought to have brought a larger sum, and has requested the trustees to report his objection to your honor, &c.

Exhibit A, filed with report.

“*Montgomery* county, 4th month 8, 1843, *R. Mickle* and *G. L. Dulany*, trustees.

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“*R. Mickle’s* letter of the 3rd inst. reached me yesterday, informing me of an offer you have had of \$10,000 for the rolling mill property ;—certainly a great sacrifice, but all things considered, am willing to let it go for that price, if you cannot possibly get more ; of course you will have one cash payment,

Respectfully your friend, THOMAS TYSON.

In case the purchaser does not intend it for an iron establishment, perhaps you can reserve the old iron and machinery,
T. T.”

Exhibit B.—“I hereby offer *Grafton L. Dulany* and *Robert Mickle*, trustees for the rolling mill property at *Ellicotts Mills*, consisting of three tracts of land, say about 94 acres in all, with the buildings and appurtenances thereunto belonging, \$10,000 in cash, on the ratification of this sale by the Chancellor of *Maryland*, and on delivery of a good and sufficient deed of conveyance of the same to me in fee.

December 4th, 1843.

W. P. JENKS.

Executed in duplicate.”

“The above offer we hereby accept, subject to the ratification of the Chancellor.

G. L. DULANY,

R. MICKLE.”

“The undersigned hereby approve of the above, and pray his honor, the Chancellor, to confirm the sale forthwith.

R. MICKLE, trustee of *Jona. Ellicott and Sons*,

J. M. GORDON, pres. of the *Union Bank of Md.*,

E. T. ELLICOTT, & Co.,

A. and J. ELLICOTT, & Co.,

ELIAS ELLICOTT.”

This report was accompanied with usual affidavit of the trustees, and was confirmed *nisi*, the 19th January 1844.

After proof of publication of this order, the appellant, on the 9th February 1844, filed her petition, alleging that she was the owner of one third of the property sold, and that the decree does not authorise the trustees to sell said property at private sale, yet the said trustees have undertaken to sell the same at private sale. It is true, that the said *Thomas Tyson* did, in April or March 1843, sign a consent that the said pro-

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perty should be sold, at that time, at private sale, but this had reference to a particular and special purchaser or purchasers, confined to that alone, and to that time, not intended to extend to any other or subsequent offer, and certainly did not extend to the offer of *Wm. P. Jenks*, and the sale to him now sought to be ratified; in accepting the said first mentioned offer, it was expressly understood by the said *Thomas Tyson*, that the very valuable rolling mill machinery, and iron belonging to the establishment, worth \$1000, should be reserved; said sale was not made, and there was an end to the consent of the said *Thomas*, if, indeed, he had any right to consent. Your petitioner alleges, in confirmation of what she has here stated, that afterwards, to wit, in the month of June or July 1843, an agreement was entered into between the said *Thomas* and others, the parties interested in said property, that the same should be sold at private sale, but said sale was expressly limited to the sum of \$12,400, and no other agreement to sell at private sale was afterwards made; said agreement is now in possession of the said trustees, or one of them, and your petitioner begs leave that they may be required to produce it, and in case they do not, that she may be allowed to give parol evidence of its contents. Your petitioner expressly alleges, that her consent, or that of her guardian and next friend, or of any others, having a right to act for her, was not obtained to the said sale for \$10,000 to the said *Jenks*. Your petitioner further alleges, that by the will of her grand-father filed in this cause, to wit, the will of *George Ellicott*, no sale is allowed to be valid without the consent of *Elizabeth Ellicott*, the widow of said *George*; and your petitioner avers, that although the said petitioner has consented that a decree should be passed for the sale of said property, yet she has, in no case, and in no wise, consented to any particular sale. Your petitioner further alleges, that the sum of \$10,000 for the said rolling mill property, with all the mill machinery, and iron belonging thereto, is far below its value, and would be a great sacrifice thereof, and that much more could have been, and can now be obtained for the same. Your petitioner believes that

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\$15,000 would be a small price for such valuable property : consisting of water power sufficient for any operation, mill dam, rolling mill, a large number of valuable tenements, and eighty or ninety acres of land, in and near the thriving village of *Ellicotts Mills*, and on the Patapsco river. Your petitioner offers the above, as reasons why the said sale should not be ratified, and prays that the same may be set aside.

On the 9th February 1844, the Chancellor (BLAND,) ordered, that the matter of the foregoing petition stand for hearing on the 19th instant, under the order of 19th December last, allowing cause to be shewn against the ratification of the said proposed sale. On the 19th day of February 1844, the trustees filed their answer to the said petition, and alleged, that the assent of the said *Thomas Tyson* to a private sale of said property, at the sum of \$10,000, was given, to enable and authorise these respondents to sell the same to any person disposed to purchase it at that price, and was not confined to time or persons ; nor was there any understanding or any proposition to reserve the rolling mill machinery, or iron belonging to the establishment, out of said sale ; and these respondents further state, that the said *Thomas Tyson*, subsequently to the date of said letter, and always afterwards, when he conversed with these respondents about the sale of said property, expressed his willingness to take \$10,000 for the same, and lamented that they had not accepted that sum when it had been formerly offered. They further state, that some time in June 1840, *John S. Tyson*, the brother of the said *Thomas Tyson*, and his present solicitor, suggested to these respondents, as they could not get a price for the property here, that an advantageous sale might be effected in some of the eastern cities, and offered to make the effort if he were properly compensated therefor ; and these respondents agreed with said *John Tyson* to allow him a handsome and graduated commission for selling the same, which was subsequently approved of by the said *Thomas Tyson*, representing the complainant and the other parties interested therein ; which agreement they have ready to be produced to this court, if the same be that to which the complain-

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ant refers, the portion of said agreement which is cancelled and partly obliterated, was struck out by these respondents. These respondents were greatly surprised to find any opposition made to said sale by the said *Thomas Tyson*, especially for the reasons assigned in said petition. They believed, and now believe, that the price of \$10,000 was as good as could have been obtained for that property when it was sold. It had been in the market at that price for some months, and it was generally known, as these respondents believe, that it would have been sold for that sum; whether or not more could be obtained for it, since it was agreed to be sold, these respondents cannot say, but they believe property, generally, has advanced since then. These respondents are only anxious to discharge their official duties to the satisfaction of this court, and await its further order and direction in the premises.

The agreement referred to in the within answer, was as follows:

“I propose to undertake the sale, of the rolling mill property, out of the State of *Maryland*, on the following terms, viz:

If they should be sold by me for the sum of

\$20,000, I am to receive, as a commis.,	-	-	\$2,000
From 20,000 to 19,000	“	“	- - 1,800
“ 19,000 to 18,000	“	“	- - 1,600
“ 18,000 to 17,000	“	“	- - 1,400
“ 17,000 to 16,000	“	“	- - 1,300
“ 16,000 to 15,000	“	“	- - 1,000
“ 15,000 to 14,000	“	“	- - 800
“ 14,000 to 13,000	“	“	- - 600
“ 13,000 to 12,000	“	“	- - 400

If I should be the means of procuring a purchaser in the State of *Maryland*, I shall expect half-commission at the above rates, the trustees to have the privilege of selling, at any time, without my agency; should the trustees, without my agency, procure a purchaser out of the State, I shall expect my expenses and charges to be defrayed, to an amount not exceeding one hundred and fifty dollars. This agreement to last sixty days from the date hereof.

June 16th, 1843.

JOHN S. TYSON.”

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“Baltimore, 16th June 1843.—We agree to the within terms.
Andrew Ellicott, for *E. T. Ellicott & Co.*, and *A. & J. Ellicott & Co.*

J. M. Gordon, for *Union Bank of Md.*

R. Mickle trustee of *Jona. Ellicott & Sons.*

Thomas Tyson, guardian.”

On this petition, answer, and exhibit, on the 19th February 1844. The Chancellor (BLAND,) finally ratified the sale, and the said *Elizabeth Tyson* appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MAGRUDER, J.

By GLENN and J. JOHNSON for the appellants, and

By ALEXANDER and DULANY for the appellees.

DORSEY, J., delivered the opinion of this court.

The trustees report shews, that “on the 21st of June 1841, the property was offered at sale, pursuant to the decree; but being unable to obtain any bid for it, it was withdrawn and offered at private sale. And not being able to dispose of it in this way, it was again advertised and offered for sale, as directed by the decree, on the 12th of October 1842; and being unable then to sell it at the price agreed on, as its minimum value, by the trustees and all the parties interested, the trustees again advertised it at private sale, and made unusual exertions to obtain a purchaser on favorable terms, without success; when it was thought advisable by the trustees and the parties interested, to sell the said property for ten thousand dollars, if so much could be obtained for it.” “That the said trustees, although they made every effort to dispose of said property, could not obtain an offer for it, even of the amount of ten thousand dollars, until they were offered that sum, on the 4th of December 1843, by William P. Jenks.”

Had the trustees, instead of accepting the offer and making the sale, as they did, have reported the foregoing facts to the Chancellor, and asked his permission to sell the property on the terms proposed, at private, instead of public sale, as di-

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rected by the decree, can it be doubted that he would have granted the authority they solicited? We think not. If then the trustees have exercised a power, which, if previously applied for, would have been granted, as it were, as a matter of course, a court of equity will, in the absence of proof shewing the inexpediency and injustice of so doing, ratify the act done, in the same manner, as if, the requisite authority had been antecedently applied for and granted.

Were there sufficient grounds before the Chancellor to have warranted his refusal to ratify the sale in question, is then, the enquiry before us? No testimony has been taken to sustain the allegations, urged for that purpose, in the petition seeking to vacate the sale; although almost all of them that are material, have been denied on oath, in the answers of the trustees; which answers and the reports of the sale, made by the officers of the court, (who are presumed to have no interest in the subject matter,) must be credited, until over-ruled by proof.

The assent of the grand-mother of *Elizabeth Tyson*, to the Chancellor's decree, is a sufficient compliance with the requisition of the will of her grand-father, *George Ellicott*. The assent of *Thomas Tyson*, the father and next friend of *Elizabeth Tyson*, to the sale which has been made of the property, by the trustees, we think fully established by their report and answers.

The allegation that, at the time of the sale made, a much larger sum of money could have been obtained for the property, being wholly unsustained by proof, and explicitly denied by the answers, can be of no avail to the appellant. Nor can it redound to her benefit, that the property, from a general enhancement in value, since the sale, would now sell for more money. The ratification or rejection of the sale must depend on the state of circumstances existing at its date; not on subsequent contingencies. Suppose, instead of appreciating, the property had greatly depreciated since the sale, who would have borne the loss? The purchaser, unquestionably. Upon the plainest principles of justice, then, he must reap the fruits of its appreciation.

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The order of the Chancery Court, of the 12th of February 1844, ratifying and confirming the sale, made and reported in this case, is affirmed with costs.

ORDER AFFIRMED, WITH COSTS.

CHARLES ROGERS AND SAMUEL MARFIELD, vs. THOMAS SEVERSON.—*December 1844.*

In an action to recover for repairs done to a carriage in June 1837, the plaintiff offered an absolute bill of sale of it, from *M.* to the defendants, dated July 1836. The defendants, for the purpose of showing that the bill of sale to them was designed to be a mortgage, or a conditional sale, and to rebut the inference, that *M.*, who continued to be the driver of the carriage, and took it to the shop of the plaintiff, was their agent, proposed to offer in proof, entries in their *Blotter, Ledger, and account books*, in relation to the transactions between them and *M.*; HELD inadmissible to modify the bill of sale, and insufficient to rebut an agency in 1837.

Various circumstances in relation to the possession and ownership of a carriage sent to a mechanic for repairs stated and considered, making a case for the exclusive consideration of the jury, whether the repairs were made by the authority of the defendants.

For repairs made to a carriage for the benefit of the defendants, and with their knowledge and approbation, they would be liable; but whether so made, is a question for the jury.

In what character a person who takes a carriage to a mechanic to be repaired, is in possession, whether as driver, servant, agent, or owner, is a fact for the jury.

Where repairs done to a carriage, enured to the benefit of a third person, who in fact, took it to be repaired, he is responsible; and where the state of the proof enables the jury to regard the case in that aspect, it is error to instruct them *imperatively*, that upon finding the fact of property in the defendants, and repairs made with their knowledge and approbation, that the plaintiff is entitled to recover.

APPEAL from *Baltimore County Court.*

This was an action of *assumpsit*, commenced on the 1st February 1838, by the appellee against the appellants, who pleaded *non assumpsit*, on which plea issue was joined.

1ST EXCEPTION. At the trial of the cause, the plaintiff offered proof, by *Lerew*, that *Mr. Charles Rogers* said, he would not pay for any work done for him, unless he, or his

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partner, sent a written order, or came himself; the witness said he never saw any written order from *Mr. R.*, or *Marfield*, he generally saw *Mr. R.* there, mostly, every day, which might be the reason he saw no orders. Witness said he was a partner of *Mr. Colvin* during the whole time, and that his bills against *R.* and *M.* were about \$800, or \$900. Witness also proved, that *T. D. Colvin* sold to *R.* and *M.* a darkish colored carriage, with C springs, and dark blue lining; which carriage is now, or was lately in *Bishop's* yard, the carriage originally built by *Lee*; the sale might have been three, four, or five years ago; referring to a memorandum, made in deponent's presence; from the book of *Colvin*, he, witness, proves the time of sale in April 1836; after the sale, the carriage was brought by *John Mitchell*, or some person who drove for *Mitchell*, to *Colvin's* shop where deponent worked, seven or eight, or perhaps a dozen times, to be repaired, and deponent worked on it, and the bills for the repairs were paid by *R.* and *M.*; deponent knows that *Mitchell* got the carriage from *R.* and *M.*, but whether he bought it or not, deponent does not know; *Mitchell* never told him he was the owner of the carriage, and if he had told him, witness would not have believed him: all the repairs, at all times, were paid by *R.* and *M.*; witness would not have trusted *Mitchell* for the repairs; has examined the accompanying bill, and the charges for the work are reasonable and fair, according to that time, And also proved by a witness, named *Bishop*, that he was a carriage maker, and that a certain *John Mitchell* brought to his shop a carriage, to be repaired; that *Mitchell* agreed to pay cash for the repairs, when finished. After the repairs were completed, witness refused to let the carriage go, until the repairs were paid for; *Mitchell* then requested witness to call upon the defendants, which he did. They agreed to pay him, and he then charged the repairs to the defendants, and suffered *Mitchell* to take away the carriage. He also proved, that the defendants, afterwards, paid for the repairs; that the contract, for the repairs, was made with *Mitchell*; that if he had considered the defendants responsible for them, in the

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first instance, he would not have objected to *Mitchell's* carrying away the carriage. Witness does not know what arrangement there was between *Mitchell* and the defendants, which induced the latter to assume the payment of the said repairs. That said repairs were not entered in his books, until he knew who was to pay for them. He also proved, that in 1838, a dark colored carriage, with blue lining and C springs, (the carriage might have been called black,) was sent to the shop of witness, by *Marfield*, one of the defendants, with orders to have it repaired; and that said carriage still remains at the shop. Witness could not say, that it was the same carriage on which he had formerly done repairs. The plaintiff, further to support the issue on his side, proved by *Booth*, that the carriage, now at the shop of the said witness, *Bishop*, is the same carriage upon which repairs were done, by the plaintiff, and for the amount of which, this suit is instituted to recover. Said *Booth* further proved, that *Rogers*, one of the defendants, was frequently at the shop of the plaintiff, while the said carriage was undergoing repairs, and that he saw it there. He, witness, however, did not hear *Rogers* agree to pay for the repairs, nor does he know to whom the plaintiff originally charged the same. The witness further proved, that in order to see the carriage, *Rogers* had to go up stairs out of his way, and out upon the open platform, where the carriage was. The plaintiff, further to support the issue on his side, offered in evidence the following account: "*Rogers and Marfield to Thomas Severson, Dr. 4th June 1847.*" The items amounting to \$199.07, consisting of various repairs done to a carriage, and \$43.75 for interest; and proved, that the work done on the carriage, was as is in said bill, and that the prices therein charged for the same are reasonable. The witness further stated, that he does not know that the defendants ever undertook to pay for the repairs; that he had heard that the carriage had been brought there by the said *Mitchell*. The plaintiff further proved, by *Col. Moale*, that in a conversation, which had taken place between *Col. Moale* and one of the defendants, between 1835 and December 1837, who stated, he

thinks that they had a carriage, and that *Mitchell* drove for them.

The above evidence being taken, the defendants prayed the court to instruct the jury :

1st. That if they believed from the testimony, that *Rogers*, one of the defendants in this case, stated to *Colvin*, that he would not be responsible for any work done upon the carriages taken to him, by *Mitchell*, for repair, unless upon his, the said *Rogers*, own order, written or verbal; and if in the instances where the defendants had actually paid for such repairs, they had been made by the said *Colvin*, at the request of the defendants, or either of them; the facts stated in the said deposition of *Lerew*, are wholly incompetent to prove, that any authority was given by the defendants to the said *Mitchell*, to make a contract for them with the plaintiff, for the repairs for which this suit is brought: and that the said deposition cannot be considered by the jury for such a purpose.

2nd. That the facts, stated in the evidence of *Bishop*, are also wholly incompetent to prove, that said *Mitchell* was authorised by the defendant, as their agent, to contract for them with the plaintiff, for the said repairs.

3rd. That the deposition of *Lerew*, and the evidence of *Bishop*, are altogether incompetent to establish a contract for the repairs done upon the carriage by the plaintiff, in this case, between him and the defendants; and that, unless the jury believe that a contract did exist, upon the part of the plaintiff, to do the repairs stated in the proof, and on the part of defendants, to pay him for them, then the plaintiff is not entitled to recover.

4th. That there is no evidence, in this cause, from which the jury can infer, that the said *Mitchell* did, in fact, contract with the said *Colvin*, in the character of agent for the defendants.

All which said several prayers, the court, (MAGRUDER and PURVIANCE, A. J.,) refused, because the court considered the whole case, so far as concerns the proposition of law, submitted to them on both sides, as covered by the prayers made by the plaintiffs, and granted by the court.

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The defendants excepted to the refusal of the court, to grant their prayers, and to the granting of the plaintiff's prayers, but this exception was abandoned by the appellants in this court.

2ND EXCEPTION. The defendants, to support the issue on their side, offered in evidence, by a witness, named *Blasdel*, that said *Mitchell* had left the State of *Maryland*, about three months ago, before the present term of *Baltimore* county court, and had gone, he did not know where; but that he believed that he had enlisted, and was somewhere in *Florida*; and also, the docket entries of the *subpœna* docket, to shew that a *subpœna* had been issued, upon the part of the plaintiff, against the said *Mitchell*, as a witness in this case, to the present term of *Baltimore* county court, and that the same had been returned "*non est*;" the said docket entries showing, that he had been returned, summoned, for three terms, prior to the present, on behalf of the plaintiff, and that he had never been summoned by the defendant. The defendants further offered to prove, by the said *Blasdel*, that said *Mitchell* was in possession of the carriage, on which said repairs, proved to have been done by the plaintiff, were placed; and that in a conversation with said *Mitchell*, he had claimed the said carriage as his, under a contract with the defendants; that they would pass their title in it to him, when he should pay the money he had agreed to give them for it.

To the admission of which said declaration and statement of the said *Mitchell*, as competent evidence, the counsel for the plaintiff objected, and the court, (MAGRUDER and PURVIANCE, A. J.,) sustained the objection, and rejected the evidence. The defendants excepted.

3RD EXCEPTION. The defendants further to support the issue on their side, offered to give in evidence the following entries in the *Blotter* of the defendants, and offered to prove, that the same were made on the 8th April 1836, as they purport to be made in said book.

These entries were headed.

"*John Mitchell to Rogers and Marfield, Dr. Baltimore, 8th April 1836. To bill of sale, and recording carriage, 6.50, per*

horses, 1.50." And also offered to give in evidence, the entries in the *Ledger* of the defendant; and offered to prove, that they were made therein, at the respective dates on which they purport to have been made.

"*John Mitchell in account with Rogers and Marfield.*" This account consisted of various debits and credits, from 1st September 1835, to 28th April 1837, and included carriages and harness, whips, hay, oats, horses, &c., and cash.

The above evidence was offered to prove, that the bill of sale, given in proof by the plaintiff, was designed as a mortgage between the parties to it, or as a conditional sale of the carriage therein named, being made by the defendants to the said *Mitchell*; and also to rebut the evidence offered by the plaintiff, that the said *Mitchell* acted as the servant or agent of the defendants, and to shew the true relationship which existed between the defendants and the said *Mitchell*. The above evidence was also offered as evidence, in connection with the testimony of *Blasdel*, which said evidence had been previously rejected by the court, for the purpose of establishing each of the facts above stated, if the court should be of opinion, that the same is not evidence for all the purposes above stated. To all of which evidence, the counsel for the plaintiff objected, and his objection was sustained by the court. The defendants excepted.

4TH EXCEPTION. The plaintiff, by his counsel, then prayed the court to instruct the jury as follows:

1. If the jury shall believe, that the carriage on which the repairs were made, was at the time of such repairs, the property of the defendants, and that the repairs while going on, were seen by, and approved by the defendants, or either of them, that then the plaintiff is entitled to recover such sum, as the jury may believe from the testimony, to be a just and reasonable compensation for the work and labor done.

2. If the jury shall believe from the testimony, that *Mitchell* was the driver of the defendants, at the time the repairs were made, and that he took the carriage to the shop of the plaintiff, to be repaired, and that while the repairs were being made,

they were shewn to, and approved of by the defendants, or either of them, that then the plaintiff is entitled to recover such sum, as the jury shall believe from the testimony, to be a just and reasonable compensation for the work and labor done, which instructions the court gave. The defendants excepted.

It was agreed in this court, that an absolute bill of sale of a carriage was offered in evidence in the court below, from *John Mitchell* to the defendants, dated 8th July 1836; that the account, in the *Blotter* of the plaintiff, (*ante* 387,) was first headed, "*John Mitchell to Thomas Severson, Dr.*," and that the name of "*John Mitchell*" was cancelled, and the name of "*Rogers & Marfield*" written above it, and that these facts be added to the record.

The verdict and judgment being for the plaintiff, the defendants prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MAGRUDER, J.

By G. L. DULANY for the appellants, and

By LATROBE for the appellee.

ARCHER, C. J., delivered the opinion of this court.

From the evidence in the cause, we should infer, that the carriage, for the repairs of which this suit has been brought, was taken by *Mitchell* to the shop of the plaintiff for repair; the account for repairs, having been originally charged to *Mitchell*, by the plaintiff. There is evidence to show, that the property of the carriage was in the defendants, but the evidence does not conclusively show, under what circumstances *Mitchell* came into possession thereof. He is proved, at one period of time, to have been the driver of a carriage for the defendants, but whether at the particular period of the repairs, is uncertain. It is also in evidence, that *Mitchell* had repairs of the same carriage done at several times, and that defendants paid for them, and that *Mitchell* had contracted with *Bishop* for the repair of a carriage, but whether of the one in question,

is not known. It is also in proof, that the defendants saw the carriage while the repairs were being made, at several times; and it is further proved, that they were in possession of the carriage in the year 1838, having brought it to the shop of *Bishop* to repair, some time during that year; how long after the repairs charged in the account filed in this case, does not appear.

Under all the evidence in the case, we think it was for the jury to determine, whether the repairs were made by authority of the defendants. If indeed, they were made for the benefit of the defendants, and with their knowledge and approbation, they would be clearly liable, but whether they were so made, was surely a question which could be determined by the jury alone. The repairs may have enured to the benefit of *Mitchell*, unless, in regard to the carriage, he was in the condition of an agent or servant of the defendants. In what manner he was in possession of the carriage, whether as driver, servant, or agent of the defendants, or otherwise, was a fact to be found by the jury.

We therefore think, that the court below were in error in their first instruction to the jury in the fourth exception, which imperatively declared the right of the plaintiff to recover, upon the finding of the fact of property in the defendants, and that the repairs were made with their knowledge and approbation.

But, we think the court were right in their second instruction to the jury in the same exception: if the jury found, in addition to the facts referred to in the first prayer, the additional fact, that *Mitchell* was the driver of the defendants, when he took the carriage for repair, they would be clearly liable for such repairs. *Mitchell*, in this aspect of the case, might and ought, in the absence of evidence to the contrary, to be considered as the servant of the defendants, and if such servant took his carriage to repair, and repairs were made, and known and approved by the defendants, the verdict, in that event, should have been for the plaintiff.

We think the court were right in rejecting the account of the defendants in the third exception, against *John Mitchell*,

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as evidence for the purposes for which it was offered. If it could be admissible to prove, that the bill of sale was in fact a mortgage, and the character of the evidence was such as could be received, we perceive nothing in the account which is sufficient to prove such fact. The other purposes for which it was offered, were not insisted upon in the argument, nor if they had been, do we think it could have been received.

The first exception, we considered as having been abandoned by the appellants.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOHN HENDERSON AND GUSTAVUS HENDERSON *vs.* WILLIAM E. MAYHEW AND OTHERS. WILLIAM E. MAYHEW AND OTHERS *vs.* JOHN AND GUSTAVUS HENDERSON.—*December 1844.*

On the 6th October 1841, *B.* executed an absolute bill of sale to *M.*, for a vessel, on which, on the 8th, he took out a register in his own name, and made the usual oath required by the act of *Congress*. On the 15th November 1841, *B.*, who continued in possession, chartered the vessel for a foreign voyage, to *H.*, who appointed *C.* master, and he, in November, and to the 15th December, purchased materials for her outfit, by *B.*'s directions. On the 20th, the account for materials was delivered to *B.* On the 19th January 1842, the charter party, made by *B.*, was assigned and delivered by him to *M.*, who then effected insurance on the vessel and freight, after an enquiry of *B.*, of the nature and particulars of the voyage. Upon the return of the vessel, in August 1842, *M.* received the freight, paid the port charges, for the first time took possession of her; in November sold her, and received the money; never having before had any possession and control of the vessel. In an action brought by the material man against *M.*, for the supplies furnished as aforesaid, **Held:**

- 1st. That the plaintiffs were not entitled to recover, upon the mere finding of the fact by the jury, that *M.* was the owner of the vessel, at the time the articles furnished her, were sold and delivered. Nor in addition to the fact of ownership, as aforesaid, the circumstances, that the supplies were furnished, and that *M.* received the benefit of them.
- 2nd. That it was not competent for *M.* to show, by parol proof, that his bill of sale was intended to be a mortgage; that it was so designed and agreed, between him and *B.*

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3rd. It was not competent, to either plaintiff or defendant, under the circumstances of this case, by any form of prayer, to withdraw the question of *B's* agency for *M.*, in procuring materials for the ship, from the consideration of the jury.

Where there was evidence offered, that *M.* was the owner of a vessel at the time she was furnished with supplies, but the account against her and her owner, was sent to *B.*, her previous owner, for payment, this cannot discharge *M.*, if, but for this proof, he would have been answerable.

Unless the vendor knows, at the time of sale of chattels, who his principal is, and notwithstanding such knowledge, makes the agent his debtor, the principal is not discharged.

The jury are exclusive judges of the weight of parol evidence offered to them, tending to prove an agency.

Oral proof is inadmissible, to change or contradict the terms of a written instrument.

Strangers to an instrument, when authorised to impeach or contradict it, may offer parol testimony for that purpose; and so a grantor may in a controversy with a grantee, if he charges the same to have been obtained by fraud or mistake.

Parties to a written instrument are not permitted, in controversies with strangers, to insist, that it does not express what it was intended to express.

Where a defendant obtained an absolute bill of sale for a vessel, authorizing the community to regard him as the owner thereof, he cannot for his benefit, be permitted to allege in an action against him, by a stranger to the instrument, that it is a mortgage.

CROSS APPEALS from *Baltimore County Court.*

This was an action of *assumpsit*, brought to May term of *Baltimore county court* 1842, by *J. and G. Henderson* against *William E. Mayhew* and others. The plaintiffs declared for goods sold and delivered, &c., and the defendants pleaded *non assumpsit*.

The jury found a verdict for the defendants.

Upon the trial of this cause, the plaintiffs, to support the issue upon their part, offered in evidence by *Samuel Ellis*, that he was a clerk for the plaintiffs, during the whole of the year 1841, and for several years before that time; and that he is now their clerk. That in the months of November and December 1841, a certain *William Champion*, who was then the master of the brig *Harriet*, of *Baltimore*, ordered from the plaintiffs, certain materials and supplies for said brig, for a

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voyage to the coast of *Africa*; that said materials and supplies were furnished to said brig, upon said order, and were charged in the books of the plaintiffs, to the “brig *Harriet* and owners.” That a bill of parcels of said materials and supplies, was shortly afterwards made out from the books of the plaintiffs, and presented to the said captain, who certified to the correctness of said bill; and that the bill now shewn to the said witness, is the original bill of parcels, of said articles, as certified by the said captain to be correct.

“*Baltimore*, December 20th, 1841. *The brig Harriet & Owners*, bought of *John Henderson & Co.*, ship chandlers and manufacturers of patent cordage, No. 71, *Pratt* street :

1841.

Nov. 23,	87½ lbs.	Russia rope, a	12½ cents,	-	\$10 93
“ 29,	522 lbs.	do. do. a	12½ “	-	65 37
Dec. 6,	Coils Manilla rope, 407 lbs.	a	14 “	-	56 98
“ “	58 lbs.	Russia rope, a	12½ “	-	7 25
“ 15,	250½ lbs.	do. do. a	12½ “	-	31 31
“ “	557½ lbs.	Manilla do. a	14 “	-	78 05
“ “	10 lbs.	Tar’d Marline, a	20 “	-	2 00
“ “	12 lbs.	Sewing twine, a	50 “	-	6 00
“ “	2 lbs.	Whipping twine, \$1. 1 doz.			
		Needles, 50 cts. 2 Palms, 75,		-	2 25

(6 Months.)

\$260 14

W. CHAMPION”

That shortly after said bill of parcels had been certified as correct, by the said captain of said brig, it was presented and delivered by the witness, as clerk of the plaintiffs, at the counting-room of *Hugh Boyle*, for payment, when it should become due, or before, at the option of said *Boyle*; that the materials were furnished on a credit of six months; but that it was customary to deliver bills for supplies, soon after they are furnished for a vessel, in order that the owners may be able to enter them in the account of the expenses of the vessel; but that sometime afterwards, how long, the witness does not recollect, having heard from some person, he thinks one of the

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plaintiffs, that *Mr. B.* was not the person to pay, he, (the witness,) went to the counting-room of *Mr. B.*, for the purpose of getting the bill; *Mr. B.* was in, and he asked him for the bill, and *B.* took it out of a bundle, and gave it to witness; that no further conversation was had with *B.* on the subject. The plaintiffs, further to support the issues on their part, gave in evidence a bill of sale, executed by *Hugh Boyle* to the defendants, on the 6th October 1841, for the said brig *Harriet*; which said bill of sale was admitted by the defendants, to have been signed and sealed, and delivered by the said *B.* to the defendants, on the said 6th October 1841; and which said bill of sale is as follows:

“Know all men by these presents, that I, *Hugh Boyle*, of *Baltimore*, State of *Maryland*, sole owner of the brig or vessel, called the *Harriet*, of *Baltimore*, for, &c., of \$6000, to me in hand paid, at, &c., by *William E. Mayhew*, *Alexander Fisher* and *Wm. D. Miller*, the receipt whereof is hereby acknowledged, have granted, &c., and by these presents do grant, &c., unto the said *W. E. M.*, *A. F.*, and *W. D. M.*, their, &c., the whole of said brig *Harriet*, of *Baltimore*, together with all and singular, her masts, &c. She now lies in the port of *Baltimore*, and is more particularly described in a certificate of registry, granted her at the port of *Baltimore*, in the following words, &c.”

And further gave in evidence by *Ring*, a competent witness, that he was a clerk in the custom house at *Baltimore*, in the year 1841; and that on the 8th October in said year, the defendants appeared in said custom house, and in pursuance of the revenue laws of the *United States*, took out the following register for the said brig, and made the oath therein contained.

“In pursuance of an act of the Congress of the *United States of America*, entitled, an act concerning the registering and recording of ships or vessels, *William E. Mayhew*, *Alexander Fisher* and *William D. Miller*, of *Baltimore*, State of *Maryland*, having taken or subscribed the oath required by the said act; and having sworn that they are the only owners of the ship or vessel, called the *Harriet*, of *Baltimore*, whereof

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Alexander Fisher is at present master, and a citizen of the *United States*, as he hath sworn: and that the said ship or vessel was built in *Baltimore*, &c.”

“We, *W. E. M.*, *A. F.*, and *W. D. M.*, of &c., do swear, according to the best of our knowledge and belief, that the brig called the *Harriet* of *Baltimore*, is of the burthen of two hundred and twenty-five and $\frac{3}{4}$ parts of a ton, and was built in *Baltimore*, in the State of *Maryland*, during the year 1822; that we are citizens of the *United States*; that our present place of abode or residence, is as above, and that we are the true and only owners of the said vessel; that there is no subject nor citizen of a foreign prince or State, directly or indirectly, by way of trust, confidence, or otherwise, interested therein, or in the profits or issues thereof, so help us God.

(Signed,)

WM. E. MAYHEW,
ALEX’R FISHER,
WM. D. MILLER.”

“Port of *Baltimore*.—Sworn to this 8th day of October 1841, before (Signed,) N. F. WILLIAMS, Collector.”

“I, *Alexander Fisher*, master and commander of the said brig called the *Harriet*, of *Baltimore*, do swear, that I am a citizen of the *United States*, having been born in *Baltimore*, State of *Maryland*. (Signed,) ALEX’R FISHER.

Custom House, *Baltimore*, 28th February 1841.”

And that *A. Fisher* was named and sworn by said defendants to be the master of said brig in said register, at the time of taking out the same; which said *A. Fisher*, the defendants admitted, was, at that time, one of the defendants mentioned as a grantee in said bill of sale.

The plaintiffs, further proved by the said *Ring*, that he has been for several years a clerk in the custom house; and that persons were permitted at the custom house, to endorse upon the register of a vessel, a memorandum of a mortgage, when they desired it; and that such memoranda were sometimes made.

The plaintiffs, further to support the issue upon their part, offered in evidence by *W. L. Brockelman*, that during the year

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1842, he was a clerk in the office of the *Neptune Insurance Company*, of *Baltimore*; and that on the 19th January 1842, the defendants applied for insurance upon the brig *Harriet* and her freight, for a voyage to the coast of *Africa* and back; that the said offer for insurance, and the acceptance now shewn to the witness, is the said original application, signed in the proper hand writing of the defendants.

“*Balto.*, Jan’y 19 1842. Insurance is wanted by *Wm. E. Mayhew & Co.*, for account of whom it may concern: amount of loss, if any, to be paid to them, to the amount of \$4000, on the brig *Harriet*, *Captain Champion*, valued thereat; from *Baltimore*, on a trading voyage, to the *American* colonies on the coast of *Africa*, and their vicinity, and back, to a port in the *United States*. They understand this to be the third voyage of *Capt. Champion* on that coast, and an acclimated supercargo went out in the vessel. They also want insurance on freight, to be valued at \$2500, and considered as earned at all periods of the voyage. What is the required premium? The *Harriet* is reported by *Capt. Clackner* in November, and cleared at this port in December last.”

“Nine p. ct. Accepted, *WM. E. MAYHEW & CO.*”

And that in pursuance of said offer and acceptance, he made out and delivered to the defendants, a policy of insurance upon said brig and freight.

The plaintiffs, further to support the issue upon their part, offered in evidence, by competent witnesses, that upon the return of the said brig from the coast of *Africa*, upon said voyage, the defendants received the freight for said voyage, and paid the port charges of said brig in the port of *Baltimore*; and that on the 2nd November 1842, the defendants sold said brig to *Greenbury B. Wilson*, and conveyed the same to him by bill of sale, which was signed, sealed and delivered, by the said defendants to the said *Wilson*, on the day of its date, to have and to hold the said brig absolutely.

And that the defendants received the consideration money, mentioned in said last mentioned bill of sale.

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The defendants, to support the issue upon their part, and for the purpose of shewing that the defendants were not the absolute owners of the brig *Harriet*, but only mortgagees, gave in evidence by *Samuel Ellis*, the witness sworn on behalf of the plaintiffs, upon cross examination of said witness, that the said *Hugh Boyle* never told him, (the witness,) that he, (*Boyle*,) was the person to pay the said bill. That the reason why he presented the bill to the said *Boyle*, was, because he considered said *Boyle* was the owner of said brig. That the plaintiffs had, for some time previously, furnished supplies for vessels belonging to said *Boyle*; and he believes they had furnished some, once before, for the said brig *Harriet*, and were paid for them by *Boyle*. The defendants, then, for the said purposes, gave in evidence by *James Hall*, a competent witness, who being duly sworn, testified, that he and the said *Hugh Boyle*, on the 15th November 1841, executed the charter party for the brig *Harriet*, now shewn to the witness, which is in the words following, &c. This was for a voyage from *Baltimore* to the coast of *Africa*, and back, and described *Hugh Boyle* as owner. That under a contract with said *B.*, for said charter party, he took possession of said brig, some days before the date of said charter party, as the freighter of said vessel, and to hold the possession and control of said brig, upon the contract and terms of said charter party, thenceforth, until sometime in August or September 1842, the time when the voyage, described in said charter party was terminated, on the arrival of said brig from the coast of *Africa* to the port of *Baltimore*. That he, the said *James Hall*, as the freighter of said vessel, appointed *William Champion* her master, about the date of said charter party. That the defendants never had any possession of said vessel, to the knowledge of this witness, until after she returned from the coast of *Africa*, in August or September 1842; that after her return, and after the termination of said voyage, the defendants took possession, and they received the freight due upon said charter party; that when, or about the time when the said vessel was chartered to him the said *James Hall*, he told said *Boyle*, that the

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said master, *William Champion*, might act as his, *Boyle's* agent, in superintending the repairs which he, *Boyle*, was bound by the charter party, to put upon said vessel, to fit her for the intended voyage; and that the said master did superintend those repairs, and from time to time, called upon, and received from said *Boyle*, instructions or orders, where and of whom to procure materials for the making of such repairs, and purchased them accordingly; and that the materials for which this suit is brought, were necessary for said brig upon said voyage. And the defendants, for the purpose of shewing that they were mortgagees, out of the possession of said brig, further offered in evidence, by *Charles Oudesluys*, that he, this witness, was the clerk of the said *H. B.*, throughout the whole of the year 1841, and until July 1842; and during that time, acted in the capacity of his book keeper, in his counting-room in the city of *Baltimore*, the residence of said *B.*; that the witness drew up the bill of sale from said *H. B.* to the defendants, or to three of them therein named, and witnessed the execution thereof; that he knew the object of said bill of sale, from the conversations he heard before its execution, between the said *Boyle* and *William E. Mayhew*, one of the defendants; that the object of it was to secure to the defendants, constituting the firm of *William E. Mayhew & Co.*, payment of the said *Hugh Boyle's* note, viz:

"\$2,628.17. *Baltimore*, October 7th 1841. Four months after date, I promise to pay to the order of *Messrs. William E. Mayhew & Co.*, twenty-six hundred and twenty-eight dollars and seventeen cents.

No. 2163. Due 7th. 10th Feb. 1843. H. BOYLE."

That he, the witness, had no particular instructions in what form to draw up the bill of sale; that he made it absolute upon its face, supposing it would answer the object designed; that in one instance before, where *Mr. Boyle* had made a bill of sale of a vessel called "*The Serene*," as security, it was made absolute on its face; that the said vessel was valued by *Boyle* at \$6000, and he mentioned that sum to the witness, to be put as the consideration in said bill of sale; that said bill of sale

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was given by the witness, after it was drawn up, to *Boyle*, who the witness supposed read it, and executed it. The money which was advanced to *Boyle*, (as a discount of his said note,) by *William E. Mayhew & Co.*, was deposited by said *Boyle*, in the *Farmers and Planters Bank*; and this witness, as clerk as aforesaid, without any special instructions from said *Boyle*; but in the discharge of what he considered his duty, as said *Boyle's* clerk, in the recording of transactions in his business, on the 9th of October 1841, made the following entry in said *Boyle's* journal:

Copy of entry in *H. Boyle's* journal, 9th Oct. 1841.

“Sundries to Bills Payable.

Farmers and Planters Bank.

P'ds, No. 1218. 4 months, 7th instant, for \$2,628.17, favor *W. E. Mayhew & Co.*, collaterally secured by a bill of sale for the brig *Harriet*, valued at \$6000, - \$2,573.42

Interest.

Out for the discount, - - - - 54.75

\$2,628.17”

The defendants, for the same purposes, further gave in evidence, by the said witness, *Charles Oudesluys*, that he knows that the identical account of the plaintiffs, now shewn to him, was presented and left for payment at the counting house of said *Boyle*; and that he, as clerk as aforesaid, entered the amount of said account to the credit of the plaintiffs, in the books of the said *Boyle*, on the 20th December 1841, while it was remaining in said *Boyle's* possession; that he noted the date of said entry on the face of said account, which he now recognizes in his handwriting; that said account was sometime afterwards withdrawn by the plaintiffs, or their clerk; that the said plaintiffs had furnished to the said *Boyle*, materials for other vessels; and afterwards, in April 1842, they furnished him materials for the steamboat *Virginia*, of which *Boyle* was the sole owner; but never before furnished materials for the said brig *Harriet*. That the whole amount of the accounts for materials or supplies, furnished to the said *Boyle*

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by the plaintiffs, as credited to them in his books, including the account for the materials and supplies furnished for the said brig *Harriet*, is \$507.67. A note was given by *Boyle* to the plaintiffs, for a part of said account, which fell due 23rd April 1842; but said note did not embrace the amount of supplies furnished the brig *Harriet*, now sued for, in this cause; that said *Boyle* had owned the said brig *Harriet* for four or five years; that on or about the 19th January 1842, the said *William E. Mayhew*, having seen the advertisement of the time of the sailing of the said brig *Harriet*, upon said voyage to the coast of *Africa*, called down at the counting house of said *Boyle*, to inquire the nature and particulars of said voyage, in order to procure insurance upon said brig, and the freight under the charter party; and that about the same time, this witness drew up the assignment of the charter party from the said *Boyle* to *William E. Mayhew & Co.*, as a further security for the note aforesaid, mentioned in said assignment, which he saw said *Boyle* execute, and which, by his direction, this witness delivered to the said *William E. Mayhew* on the day of its date, together with the charter party itself; which charter party and assignment, were then read in evidence to the jury. And the defendants, further gave in evidence by the said witness, *Oudesluys*, that the said defendants never took possession of said brig, or exercised any control over her, until after her return from *Africa*, in August or September 1842; and that said *B.* continued, in all respects, to act as the owner of said brig, after said bill of sale, as he had done before its execution. That the amount of the premium notes, given by the said *William E. Mayhew & Co.*, for the insurance of said brig and freight, were credited to them by this witness, in said *Boyle's* book, or journal, on the 29th of March 1842.

Copy of entry, 29th March 1842.

“Disbursements of brig *Harriet* to *Wm. E. Mayhew & Co.* Insurance effected by them in their name at the *Neptune* office, in this city, 19th January 1842, viz: \$4000 on vessel, and \$2500 on freight. Brig *Harriet*, from *Baltimore* to *American*

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colonies on the coast of <i>Africa</i> , and back, 9 per cent., 6	
months, - - - - -	\$685.00
Two policies, at \$1 - - - - -	2.00
	<hr/>
	\$687.00

Ship credited \$587."

That he should have entered this credit at the time when the insurance was effected, had he known the amount: he says he thinks there is an error in the amount, of one hundred dollars; that the said *William E. Mayhew & Co.* paid the said premium notes, and charged them in account with said *Boyle*, against the said brig and her freight; that when the said note of *Boyle*, in favor of said firm, for \$2,628.17, became due, on the 10th of February 1842, it was not paid by said *Boyle*; and this witness, as clerk as aforesaid, credited the same to *William E. Mayhew & Co.*, the defendants, in the journal of said *Boyle*, as having been secured by the said bill of sale of said brig *Harriet*; that the form of the entry was as follows:

"February 10, 1842.

"*Bills Payable to W. E. Mayhew & Co.*, No. 1218, my note discounted by them, due this day, and not paid, secured by a bill of sale of the brig *Harriet*, and an assignment of her freight: \$2,628.17."

That after the said bill of sale was executed, the said *Boyle* continued in possession of the said brig *Harriet*, and exercised acts of ownership over her, just as if the bill of sale had not been made; chartered her to *James Hall*, by the charter party above mentioned; and gave *Captain Champion* orders where to get the materials for the repairs, which he, *Boyle*, agreed to put upon her, under said charter party; that upon the return of said vessel from *Africa*, in August or September 1842, the defendants took possession of said vessel, and sold her; that the defendants had never had any possession or control over said vessel, before her return from *Africa*, as aforesaid; that he, the witness, never informed the plaintiffs, that *B.* had transferred the said brig to the defendants; he thinks he went once with *Captain Champion*, to the store of *Henderson & Co.*, the

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plaintiffs; that in July 1843, *Mr. Boyle* made an assignment of his property to *Grafton L. Dulaney*, in trust for creditors; that after the return of said brig, and after she had been sold by the defendants, the witness, as agent of the said *Dulaney*, as trustee of said *Boyle*, called upon *William E. Mayhew & Co.*, at their counting room, and stated to said *Mayhew*, that the bill of sale of said brig, and the assignment of her freight, under the charter party, had been made by *Boyle*, as collateral security; and that he, the witness, desired to know what surplus funds there would be, and notified the said *Mayhew*, that the surplus would be payable to said *Dulaney*, as trustee, and requested said *Mayhew* not to pay said surplus to any other persons; that said *Mayhew* referred said witness to *Mr. Cook*, the book keeper of said *William E. Mayhew & Co.*, for information, as to the surplus that would remain, of the proceeds of sale, of said brig and her freight, after satisfying their claims; and directed said book keeper to give the witness the information desired; that said book keeper examined the accounts in the books of the defendants, and gave the witness an extract on a piece of paper, of the amount of such surplus, as being about three hundred dollars; that afterwards, some further expenses were paid, and the amount reduced. In order that the defendants might have a more formal notice, the witness went to *George M. Gill, Esq.*, (*Mr. Dulaney* being out of town,) and told *Mr. Gill* the circumstances, and requested him to address a line to said defendants, on behalf of *Mr. Dulaney*, as trustee of *Mr. Boyle*, and he did so, and the following is the letter sent on that occasion:

“Dear Sir: I understand, that after paying your claim against the brig *Harriet* and her freight, there will remain a balance. To this balance, *Mr. Dulaney*, as trustee of *Hugh Boyle*, is entitled, and I now notify you that it will be claimed.

GEO. M. GILL, Att’y for *G. L. Dulaney*.

Baltimore 17th August 1842.

To *Messrs. W. E. Mayhew & Co.*”

That said *Dulaney* sanctioned said letter, and all that the witness did as his agent in the premises; that the said *Hugh*

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Boyle was in tolerable good credit when the supplies were furnished by the plaintiffs, for said brig, but not in such good credit as he had been before; that neither *Boyle* nor the witness as his clerk, had made any investigations or statements with a view to ascertain his solvency; that he was, at that time, possessed of a considerable amount of property, real as well as personal; that the witness could have purchased goods on *Boyle's* credit in the market, without question; that the first of *Boyle's* paper that was dishonored, was a note that became due on the 24th of December 1841; and further stated, that he, the witness, as the clerk and book keeper of said *Boyle*, had knowledge of *Boyle's* condition, which the public had not; but that the public would have trusted him at the time the supplies sued for in this action were furnished.

The plaintiffs then prayed the court, by their counsel, as follows:

1st. That if the jury shall believe, from the evidence in this cause, that the defendants were the owners of the brig *Harriet*, at the time the articles furnished her by plaintiffs were sold and delivered, that then the plaintiffs are entitled to recover.

2nd. That the evidence offered in this cause by defendants, to prove that the bill of sale of 6th October 1841, was intended to be a mortgage, is inadmissible and incompetent for that purpose.

3rd. If the jury shall believe from the evidence, that the defendants in this case were the owners of the brig *Harriet*, at the time the supplies in this case were furnished, and that said supplies were charged to the said brig and owners, and that said supplies were furnished to said vessel, and that the defendants received the benefit of said supplies; that the plaintiffs are entitled to recover, notwithstanding the jury shall also find that the said supplies may have been ordered through the agency of *Champion*, the captain of said vessel, and that the bill of particulars in this case was left with *Boyle* for settlement.

The defendants, by their counsel, in like manner prayed the court, as follows:

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1st. That if the jury find from the evidence, that the bill of sale of 6th October 1841, from *Boyle* to the defendants (or three of them,) was made by way of mortgage, or collateral security, to secure the payment of the note of *Boyle* for \$2,628.17, dated 7th October 1841, at four months; and that the assignment of the charter party, by *Boyle*, to the defendants, on the 21st January 1842, was made as a further security for the payment of said note; and if the jury further find, that the defendants never gave any order or authority to the plaintiffs, or to any other person, for the furnishing of the materials charged in the account of the plaintiffs, the price or value of which, they seek to recover in this action; and if they further find, that the defendants never took, or had, or exercised any possession or control of the said brig, until she returned to the port of *Baltimore*, upon the termination of her voyage under the charter party, made between *Hugh Boyle* and *James Hall*, then the plaintiffs are not entitled to recover in this action; notwithstanding that the bill of sale is absolute on its face, and notwithstanding the oath and registry made and procured at the custom house by the defendants, or some of them, notwithstanding the insurance procured by the defendants upon their order on the vessel and freight, and notwithstanding the defendants, after the return of said vessel as aforesaid, in August or September, 1842, did take possession of and sell her for the purpose of paying the defendants the amount of the said note, the premium of insurance on the said vessel and freight, and other expenses incidental to the entry of the vessel at the port of *Baltimore*.

2nd. If the jury find, from the evidence, that the supplies charged in the plaintiffs' account were furnished to the brig *Harriet*, upon the credit and upon the authority of *H. B.*, and not upon the credit of the defendants, that then the plaintiffs are not entitled to recover.

3rd. If the jury find, from the evidence, that the defendants never took possession of, nor exercised any control over the brig *Harriet*, until she returned from her voyage under the charter party; and that between the 23rd of November and

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the 15th December 1841, inclusive, (comprising the dates of the plaintiffs' account,) *James Hall*, the freighter, or *Wm. Champion*, as the master appointed by him, or both together, had the actual possession and charge of said vessel, under said charter party; and that the plaintiffs, within that period, did not know that the defendants had any title or interest in said vessel, but knew, or supposed, that *H. B.* had been, and was, the owner of said vessel, that then the plaintiffs are not entitled to recover in this action, by reason, that the law upon that state of facts, does not raise or imply an *assumpsit* on the part of the defendants, to pay for the supplies furnished by plaintiffs for said vessel, within that period, upon the order of the said master, without the knowledge or authority of the defendants.

The county court (*ARCHER, C. J.* and *PURVIANCE, A. J.*), rejected the *first* and *third* prayers offered by the plaintiffs, and granted the *second* prayer offered by them.

The court also refused the *first* prayer offered by the defendants, and granted their *second* prayer, and in addition thereto, and in lieu of the defendants' *third* prayer, gave also the following instructions to the jury.

If the jury believe that the defendants were owners of the brig, yet if they believe that *Hugh Boyle*, with the consent and permission of the defendants, chartered the brig to *Hall*, for a voyage to the coast of *Africa*, according to the terms of the charter party offered in evidence, and that the same was assigned by *Boyle*, as a security to the defendants, for their indebtedness to him, and that the defendants accepted said assignment, and that the materials for which this suit is brought were furnished after the date of the charter, and before the date of the assignment, the defendants, as legal owners of the ship, are not answerable for the materials furnished, unless the jury should believe, that the plaintiffs furnished the materials on the credit of the defendants, as the legal owners.

To the rejection by the court, of the *first* and *third* prayers, offered by the plaintiffs, and the granting of the *second* prayer, offered by the defendants, and additional instructions of the court, the plaintiffs, by their counsel, excepted.

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The defendants, under the provisions of the act of Assembly of December session.1831, chap. 319, beg leave to except, as well to the opinion of the court in refusing to grant their *first* and *third* prayers, as also to the opinion of the court in granting the plaintiffs' *second* prayer, and prayed the court to sign and seal this bill of exceptions on their behalf, which was done.

Both parties appealed to this court.

The cause was argued before DORSEY, SPENCE and MAGRUDER, J.

By TEACKLE and STEELE, D. A. G., for the plaintiffs below, and

By HINCKLEY for the defendants below.

MAGRUDER, J., delivered the opinion of this court.

This action was brought by the appellants, to recover from the appellee a sum of money alleged to be due, for supplies furnished for the brig *Harriet*, by the appellants.

It is not disputed that the supplies were furnished, but it is insisted by the appellees, that they are not responsible for them.

1st. Because they were not the owners of the vessel:

2nd. Because the credit was given to another, to wit, to *Hugh Boyle*.

There was certainly evidence offered to the jury, that the appellees were the owners of the vessel at the time that she was furnished with the supplies. But the account against the vessel and its owner, was sent to *Boyle*, and this it is supposed, was giving credit to him. It appears however, that *Boyle* was at one time the owner of the vessel, and it would seem that the account was sent to him, under an impression that he was still the owner. This proof of the account being sent to *Boyle*, cannot discharge the owner, if, but for this proof, he would have been answerable. Unless the seller knows at the time who the principal is, and notwithstanding that knowledge, makes the agent his debtor, the principal is

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not discharged. (See *Roscoe on Evidence* 216, and the authorities there collected.) Notwithstanding all the testimony, then, on the part of the appellees, designed to show that the credit was given to *Boyle*, the former may be answerable, and it is a material question in the case, whether *Boyle*, in purchasing these supplies, is not to be regarded as the agent of the appellees? There was testimony offered to the jury, "tending to prove" the agency. Of the weight to which that testimony was entitled, the jury are the exclusive judges.

The court below, therefore, erred in granting the second prayer of the defendants below, as it withdrew the question of agency from the consideration of the jury, and also in giving the instruction which was given, in lieu of the instruction asked for by the appellees in their third prayer.

No error is discovered in the rejection of the appellants' first or third prayer.

The appellants, who were defendants in the court below, took exception to the opinion of the court, that parol evidence was inadmissible to show, that the bill of sale was intended to be a mortgage. It is the opinion of this court, that the decision was correct. Parol evidence is inadmissible to change or contradict the terms of a written instrument. Strangers to the instrument, when authorized to impeach or contradict it, may offer parol testimony for that purpose; and so a grantor may, in a controversy with the grantee, if he charges the same to have been obtained by fraud or mistake. But the parties to a written instrument are not permitted, in controversies with strangers, to insist, that it does not express what it was intended to express. The appellants, after obtaining an absolute deed, and authorizing the community to regard them as the owners of the vessel, cannot now, for their own benefit, be permitted to allege that their bill of sale is a mortgage.

The party here, who is a stranger to the deed, insists, that it is what it purports to be, and the appellants who accepted it, are precluded from offering the evidence on which they rely, in order to defeat the action against them.

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Judgment must therefore be *reversed* upon the appeal of the plaintiffs below, upon this second prayer; and upon the instructions given by the court to the jury. And *affirmed* upon their first and third prayers.

Upon the appeal of the defendants below, the instructions to which they excepted, are affirmed.

DORSEY, J., dissented to the affirmance, upon the appeal of the defendants below.

JUDGMENT REVERSED UPON THE APPEAL OF J. & G.

HENDERSON, AND PROCEDENDO AWARDED.

THE CHARLESTON INSURANCE AND TRUST COMPANY *vs.* JAS.
J. CORNER AND THOMAS CORNER.—*December, 1844.*

Freight was insured on a voyage, at and from *M. V.* to *C. C.*, and at and from thence to *B.*, estimated at \$4000. It was due at *B.*, on the right delivery of the cargo there. The vessel proceeded to *C. C.*, and there delivered and took in cargo. While her lading was in progress, she was forcibly taken possession of by a foreign ship of war, and carried back to *M. V.*; where, after some detention, in March 1839 she was restored to her master, who claimed full freight from the charterer, which he resisted; and upon a submission to arbitration, the vessel was allowed \$1200, and the charter party cancelled. *C. C.* being now blockaded, the voyage was broken up and abandoned. On the 2nd May 1830, (forty-seven days after her capture,) the master chartered her on another voyage, from *M. V.* to *H.* In an action against the underwriter, it was **Held**:

- 1st. That as a contract of insurance is one of indemnity, the doctrine of *salvage* for freight, has been introduced as a fair item in the adjustment of actual loss; and that the underwriter was entitled to a credit for the sum paid the master, on account of freight.
- 2nd. The doctrine of *salvage* for freight is confined to freight earned on the particular cargo contemplated in the policy, or other freight earned on the same voyage. In such case, the insurer is only liable for the difference, because that is the extent of the actual loss by that voyage.
- 3rd. After time sufficient for the completion of the original voyage, had elapsed, the master of the vessel not being able to proceed on that, is at liberty to enter upon another, and distinct voyage: and the freight earned upon the latter voyage, will not enure to the benefit of the underwriter.
- 4th. The time in which a voyage should be performed, is a question of fact? and not to be assumed, or asserted by the court.

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5th. Upon a policy for account of whom it may concern, in an action by *A.*, where the plaintiff did not disclose by the pleading, any other interest or damage, than that which *A.* had, or sustained, he cannot recover for more than the proportion in which he was interested.

Where the plaintiff offered in evidence verbal and written testimony, to maintain his issue in an action of *assumpsit*, part of which, in writing, was admitted by the defendant, as evidence of the facts recited in it; part, as if regularly proved under a commission—another portion being a deposition of a witness, no part of the plaintiff's proof being contradicted, he cannot assume that the jury will find the facts accordingly; and pray the court to instruct them, upon that assumption.

The sufficiency of evidence to satisfy a jury, or the circumstance, that it is all on one side, does not authorize the court to direct them, that it proves a fact in controversy.

The jury have the power to refuse their credit to parol testimony, and no action of the court should control the exercise of their admitted right, to weigh its credibility.

A charter party granted and let on freight, the whole tonnage of a vessel, for a voyage from *M. V.* to *C. C.*, and thence to *B.* When the lading at *C. C.* was completed, she was to depart and proceed to *B.*; where the cargo was to be discharged, and thus end the voyage. In consideration of which, the charterer agreed to pay the owners a gross sum, "payable on the right delivery of the cargo at *B.*" The vessel received cargo at *M. V.*; proceeded to *C. C.*; where a part was landed, and a part of the cargo destined to *B.*, shipped. At this time she was forcibly taken possession of by a ship of war, and carried back, by force, to *M. V.*; where she was, after some delay, restored to her master. Under such circumstances, the charter party did not impose an obligation on the charterer to pay the whole freight at *M. V.*, as if the vessel had proceeded to *B.* The intent of the charter was, that a full and complete cargo should be received at *C.* and delivered at *B.*, to entitle the owner to full freight; the charterer being in no default.

APPEAL from *Baltimore County Court.*

This was an action of *assumpsit*, commenced on the 31st December 1839, by the appellees against the appellants.

The plaintiffs declared, on the policy mentioned in the bill of exceptions, and assigned as a breach of the contract, that heretofore, to wit, on the 20th February 1839, divers goods of great value had been and were shipped and loaded at *Monte Video*, in and on board the said brig or vessel, in the said policy of insurance mentioned, to be carried and conveyed therein, on and for freight in and during said voyage, to wit,

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at the county aforesaid, and that they, the said plaintiffs, were then and there, from thence until, and at the time of the loss hereinafter mentioned, interested in the freight of the said goods so shipped and loaded as aforesaid, to a large value and amount, to wit, to the value and amount of all the moneys by them ever insured, or caused to be insured thereon, to wit, at the county aforesaid. And the said plaintiffs in fact, further say, that heretofore, to wit, on 20th February 1839, the said brig or vessel, with the said goods on board thereof, departed and set sail from *Monte Video* aforesaid, on her said voyage towards *Corrientes* aforesaid, and that the freight of the said goods, in the case of her arrival there, would have amounted to a large sum of money, to wit, the sum of four thousand dollars; and that afterwards, and whilst the said brig was at anchor in the bay near *Cape Corrientes*, to wit, on the 16th of March 1839, the said brig or vessel, with said goods on board thereof as aforesaid, were on the high seas, to wit, at the county court aforesaid, with force and arms, and in an hostile manner boarded, captured, seized and forcibly taken possession of, and the *American* flag hauled down by the *French* vessel of war, the *Perle*, and the captain, officers and crew of the said brig *Eliza Davidson*, made prisoners, a part of whom were sent on board the said vessel of war, the *Perle*. And owing to the arrests, restraints and detainments of kings and princes, the said plaintiffs thereby, then and there lost, and were deprived of the freight of the said goods and merchandise so on board the said brig, on freight as aforesaid, at the county aforesaid; of all which said several premises, the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice, and were then and there requested, by the said plaintiff, to pay them the said sum of \$4,000, so by them insured to the said plaintiff as aforesaid, &c.

The defendants appeared and pleaded the general issue.

The jury found a verdict for the plaintiffs, \$3,437.70, on which judgment was rendered.

At the trial of the cause, the plaintiffs offered in evidence the following proposal for insurance, accompanied by the letter of

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John I. Mattison, of the 2nd of February 1839, and the consular certificate of *R. M. Hamilton*.

“Dollars four thousand, on freight of goods, estimated at—
Dollars three hundred, on *Chronometer*.

The above sums are offered for insurance by *J. J. Corner & Bro.*, on account of whom concerned (citizens of the *United States*), per the *American* brig *Eliza Davidson*, *Mattison* master, at and from *Monte Video* to *Cape Corrientes*, and at and from thence to *Boston*. The vessel safe at intended to sail on or about 14th February, from *Monte Video*. Sailed from N. B. Every circumstance material for the underwriters to know, so as to form a just opinion of the above risk, is disclosed in this offer. 22nd April, 1839. The premium on the above vessel was fixed by the agent of the *Charleston Insurance and Trust Company*, at the agency in *Baltimore*, this 22nd day of April 1839, and at the rate of $1\frac{3}{4}$ per ct.

Accepted—J. J. CORNER & BRO.”

“*Monte Video*, February 2nd, 1839. *Messrs. Jas. J. Corner & Bro., Baltimore*. Gentlemen,—Since my last, per *Mentor*, I have chartered the brig *E. Davidson*, to load part of a cargo at this port and proceed to *Cape Corrientes*, in the lat. of 38° south, and there load with a cargo of bale goods for *Boston*, allowing the shippers fifty lay days at the *Cape*, for the round sum of four thousand *Spanish* dollars. To obtain this freight, I have agreed to give them the use of what funds I may have, at par, for a draft at sight on *Boston*. I shall sail from here on or about the 14th inst. You will please make insurance on the amount of the charter, and \$300 on a chronometer I bought here. The port I am about to proceed to is in the province of *B. Ayres*, but is not included in the blockade, as you will perceive by the annexed certificate of the *U. S. Consul*.

I remain your ob't. serv't., JOHN I. MATTISON.”

“*Consulate of the United States*. I, the undersigned, consul of the *United States*, do hereby certify that the
[Consular Seal.] port of *Corrientes*, to which the brig *Eliza Davidson* is bound, is not within the limits of the blockade by the *French* squadron. Given under

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my hand and seal at *Monte Video*, this 2nd of February 1839.

R. M. HAMILTON.”

And the policy of insurance following, which was admitted to have been signed by *T. P. Williams*, the authorised agent of the defendants :

“By the *Charleston Insurance and Trust Company*. Open policy, No. 65. This policy of insurance witnesseth, that the *Charleston Insurance and Chronometer. Trust Company* have insured, and by these presents do insure *James J. Corner & Bro.*, at and from *Monte Video* to *Cape Corrientes*, and at and from thence to *Boston*, as per annexed endorsements, as well in his or their own name, as in the name or names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in whole, lost or not lost : beginning the adventure respectively upon the property insured, that is to say, on all lawful goods and merchandize, from and immediately following the loading thereof, and so shall begin, continue and endure until said goods, merchandize or freight shall be safely landed : and on vessels, the risk shall begin at and from the places of departure, and so shall continue and endure till said vessel shall have arrived, and been moored at anchor twenty-four hours in safety, &c. The adventures and perils which the said *Insurance Company* are contented to bear, and take upon them, are of the seas, &c., enemies, pirates, &c., restraints and detrainments of all kings, princes or people, of what nation or quality soever, &c. ; and of all such other losses or misfortunes which have, or shall come to the damage or detriment of the property, or any part thereof, as insurers are legally accountable for. Warranted, nevertheless, by the insured, free from any charge, damage or loss, which may arise from, or in consequence of any illicit or prohibited trade, or trade in articles contraband of war, &c.

In witness whereof, the *Charleston Insurance and Trust Company* have caused these presents to be signed by their agent in the city of *Baltimore*, this 22nd day of April 1839.

THOS. P. WILLIAMS,

Agent of the *Charleston Insurance and Trust Co.*”

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“\$4000 on freight. 300 on chronometer.”

They further offered in evidence the charter party, following, viz:

“This charter party of affreightment, made and entered into this 1st February 1839, between *John I. Mattison*, master of the brig *Eliza Davidson*, now lying in the harbor of *Monte Video*, of the one part, and *Alfred Peabody* of the other part. Witnesseth, that the said *John I. Mattison*, for the consideration hereinafter mentioned, has covenanted, granted and let on freight, unto the said *Alfred Peabody*, the whole tonnage of the said brig *Eliza Davidson*, for a voyage to be made with the said brig, in manner hereinafter mentioned. And the said *John I. Mattison* does hereby promise, that the said brig shall be staunch, &c., and that she shall receive on board from the said *Alfred Peabody*, goods to the amount of sixty tons, or thereabouts, with which she will proceed to *Cape Corrientes*, where she will discharge said goods, and receive on board from the said *Alfred Peabody*, a full and complete cargo of bales, &c., the same to be put on board at the expense of the said *Alfred Peabody*, and when the said lading is completed, to depart and proceed to the port of *Boston*, where the cargo is to be discharged; and being there arrived, the said lading to be delivered to the said *Alfred Peabody*, or his agents or assigns, and thus end the voyage, (excepting always against the dangers of the seas, robbers, pirates, restraints of princes and rulers, and all unavoidable accidents and calamities,) for and in consideration of which, the said *Alfred Peabody* consents, promises and agrees, to and with the said *John I. Mattison*, that there shall be paid to him, his agents or assigns, the sum of four thousand one hundred *Spanish* dollars, or equivalent, payable on the right delivery of the cargo at the aforesaid port of *Boston*. And the said *John I. Mattison* further promises and agrees, to allow fifty running days to unlade, &c.”

“The above charter party is cancelled this day. *Monte Video*, April 2nd, 1839.

ALFRED PEABODY.”

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The plaintiff also offered in evidence, the protest made before the consul of the *United States* to the *Oriental Republic* of the *Uruguay*, by *John I. Mattison*, master, and others of the *American* brig, *Eliza Davidson* of *Baltimore*, who being duly sworn, did depose as follows :

“That he, the deponent, having engaged with *Mr. Alfred Peabody*, a citizen of the *United States*, to perform a voyage in the brig under his command, from *Monte Video* to *Loberia Chica*, on the coast of *Patagonia*, and from thence to *Boston*, in the *United States*, did sail from the said port of *Monte Video* on the 20th February 1839 ; and that on the 23rd of same month, at 1 o’clock, P. M., made the land, the north part of *Cape Corrientes*, distant about ten miles, and at 4 o’clock, P. M., the harbor near *Corrientes* bore W. N. W. seven miles, at which time he tacked, &c. On the 24th made the land again, bearing W. N. W., the weather being boisterous, kept an offing ; on the 25th, at 6, A. M., the weather having become moderate, made all sail for the land ; at 10 h. 30 m. A. M., made *Cape Corrientes* ; at 1 h. 30 m. P. M., came to anchor in the bay ; on the 26th, the deponent went on shore, and returned with some laborers in the boat, and commenced discharging his cargo, &c ; on the 3rd March, discharged and received a cargo on board ; the 4th, weighed the anchors and run near the shore to make a better harbor—discharged and received cargo on board, &c.; the 16th same month, observed a vessel in the offing, being the first since their anchorage in the bay ; at 10 A. M., she proved to be the *French* vessel of war, “the *Perle*,” which boarded the brig and took immediate and forcible possession, and hauled down the *American* flag, and made prisoner of the deponent, his officers and crew, part of whom were sent on board the *Perle* ; these steps were taken by the *French* officer and his crew prior to his asking for the vessel’s papers, or any question by which they could have ascertained the national character of the said vessel—eleven *Frenchmen* remained in charge of the brig, with their arms about them ; at 4 P. M., they descended into the hold, and drew off a portion of wine and rum for their use, being part

of the cargo; at 5 P. M., they attempted to get the brig under way, in doing which, they upset the windlass, and carried away the greater part of the pall plates; at 6 A. M., they concluded to remain at anchor during the night, and set a watch, five men in each, all armed—in hoisting some casks of water on board, they spilled a large quantity on the goods in the hold, which caused considerable damage; on the 17th, strong breezes from the northward and eastward; at 6 A. M., the boats of the *Perle* boarded us with about twenty men, and immediately got the brig under way, cutting the running rigging and breaking many articles that came in their way; they also broached the brig's provisions, and used them without ceremony. March 18th, the *French* crew regularly drew from the cargo three buckets full of wine per day, and used the brig's provisions extravagantly, and the vessel was managed so badly, that the deponent considered the safety of the vessel, and his life in great danger, there being but two able seamen among the *French* crew; on the 20th same month, at 8 A. M., made *Monte Video*; at 1 P. M., came to anchor within half gunshot of the flag ship of the *French Admiral*, after which an officer from the *Perle* came on board, and took an inventory of the cargo on board, and the vessel's roll, clearance and bill of health; on the 21st, the mate of the brig was sent from the *Perle* on board, and the deponent was permitted to go on shore, the *French* crew still in the possession of said brig, and the greater part in a state of intoxication, having free access to the wine and spirits, and provisions generally; 25th, at 1 P. M., *Commodore Nicholson*, in command of the *U. S. Squadron*, came along side of the brig, accompanied by the *American Consul*, and took the deponent on shore for the purpose of an interview with the *French Admiral*, who, through the demand of *Commodore Nicholson*, determined to give up the vessel and cargo on board, to the deponent, but refused any remuneration as damages for the detention and illegal capture of said brig. On the 26th same month, at 7 A. M., a boat from the *Perle* came along side, and placed the original crew of the brig on board, and took the *French* officer and crew from on board,

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thus delivering the vessel to the deponent, after having forcible possession for ten days, during which time the said brig suffered severely in her sails, rigging, &c., in consequence of negligence and the incapacity of the *French* crew. And the deponent further declares, that he was not asked for his vessel's papers until nearly half passage to *Monte Video*, from *Loberia Chica*, and that he then refused them, upon the ground that he had been illegally captured, and that the said papers should have been asked for prior to taking and holding possession of the said vessel, and that after the anchorage near the *Admiral's* ship, an officer from the *Perle* came on board and demanded the papers, which were delivered by the deponent, viz: roll, clearance, and bill of health, which were afterwards returned. Therefore, &c.

Signed, JOHN I. MATTISON."

And which was admitted as evidence of the facts therein recited.

The certificate of *Alfred Peabody* declared that, "On the first day of February 1839, I chartered from *Capt. J. I. M.*, the brig *E. D.*, under his command, and lying in the harbor of *M. V.*, for a voyage hence to *C. C.*, and thence to the port of *B.*, for the round sum of \$4,100; that the the said brig proceeded to her first place of destination, and while there, partially laden, was forcibly taking possession of by one of the *French* blockading squadron, and brought to this port, by which act, the voyage was destroyed. That *Capt. M.*, on his arrival here, claimed the full amount of the charter of his vessel, as per charter party, which I refused to comply with, on the plea, that he had not fulfilled his part of the contract by the non-completion of the voyage; that *Capt. M.* refused to deliver up any part of the cargo taken on board at *C. C.*, until his charter was satisfied; that to avoid unnecessary expense and delay, we finally agreed to leave the matter to arbitration, and that it was settled accordingly. I further certify, that had *Capt. M.* refused to comply with the decision of the arbitrators, and had still insisted on the full amount of his charter, I should have protested against him, having ad-

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vised the consul of the *United States* of my intention to that effect, and should have applied to the authorities here to have detained his vessel until the property on board of her had been delivered up to me, on my paying that portion of the charter determined by the arbitrators. In testimony whereof, I hereunto set my hand, this 30th April 1840.

ALFRED PEABODY."

Which it was agreed should be received as evidence as fully as if regularly proved under a commission.

The plaintiff also proved the awards following :

"Having been called upon to arbitrate in the case of a dispute which has arisen between *Mr. Peabody*, the charterer of the brig *E. D.*, and *J. M.*, the master of that brig, with regard to the amount that should be paid the said master, (on the discharge here of the cargo now on board that vessel,) to cancel the agreement entered into between the two parties. I beg to say, that I have perused the charter party—have also heard the explanations made by both parties, and now give it as my opinion, that *Mr. P.* should pay the said *Capt. Mattison* \$1,200, in full of all demands.

ALEX. ROGERS.

Monte Video, 1st April 1839."

"In the case of the brig *E. D.*, chartered, &c. My opinion is, that in consideration of *Captain Mattison* having fulfilled, as far as in his power, the contract entered into, carrying and delivering the quantity of cargo agreed on, to *Cape Corrientes*, and having brought seventy-six bales, admitted to be one-fourth of a cargo for the vessel, to *Monte Video*; and further, by performance of this part of the voyage, encountered the risks and perils which the difference of freight from *Monte Video* to *Boston*, and from *Monte Video* via *Cape Corrientes*, to same port, prove to be greatest, the one, at the time, being about two thousand hard dollars, the vessel is entitled to one-half for her freight. As, however, the charterer does not derive benefit from the part of the voyage performed, to any thing near that proportion, my idea is, that the third party causing the non-fulfilment of charter, should be called on and made accountable for the difference, and suggest the following mode

of settlement: that the charterer pay to the vessel \$1,200 in full, for the part of the voyage actually performed, receiving the bales from on board in *Monte Video*; and that his claim on the *French Government* for the balance, say eight hundred and fifty hard dollars, if recovered, be paid over to *Capt. Mattison*. By such an arrangement, the loss sustained would fall equally on either party, which, in equity, it should; neither being culpable for the want of performance and unlooked for difficulties that have occurred. ROBT. C. McLEAN.

Monte Video, 1st April 1839.”

The cancellation of the charter party of the 1st of February 1839, was admitted.

The defendant thereupon proved that *John I. Mattison*, the master of the brig *Eliza Davidson*, was a part owner of the said brig, at the date of the said charter party of the 1st February 1839, and of said policy of insurance, and has so continued down to the present time; and that said owners received from *Alfred Peabody* the sum of \$1,200, awarded as is hereinbefore stated. The defendant further offered in evidence the charter party, following:

“Contract of affreightment entered into before me, the undersigned, licensed broker, between *Messrs. James Cruset* and *John I. Mattison*, Captain of the *American* brig, *Eliza Davidson*, *Messrs. Southgate & Co.* being her consignees.

Article 1st. *Mr. James Cruset* freights from her captain, *John I. Mattison*, the *American* brig *Eliza Davidson*, to load with meat for *Havana*, obliging himself to put on board from four thousand five hundred to five thousand quintals of meat, at most, and to pay for freight, \$5,000, in gold or silver, over and above the sum of five per cent. *capa*, (a kind of commission not known to the translator.)

Art. 2nd. *Capt. Mattison* allows the freighter one hundred and thirty days for the loading at this port of the *Eliza Davidson*, and her discharge of cargo in *Havana*; and if, at the end of that time, any part of the cargo should remain on board, the freighter shall pay \$25 per day demurrage, for every day thereafter.

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Art. 3rd. *Capt. Mattison* obliges himself to place his vessel in all proper condition, sound and dry, to prosecute the voyage.

Art. 4th. The freighter obliges himself to provide payment for storage, and to pay for the straw which may be necessary for the proper conveyance of the meat.

Art. 5th. *Capt. Mattison* obliges himself to consign himself and vessel to such house in *Havana*, as the freighter may designate, and will pay to his consignees two and a half per cent. commission for the collection of freight.

Art. 6th. The time above designated, will commence running from the 3rd day of May, and will cease on the day when the freighter shall advise the captain that the cargo is ready. It will begin to run in *Havana*, from the day that the vessel is ready to discharge; both the contracting parties sign the above contract by common consent, and bind themselves to its fulfilment respectively; the one by his cargo, the other by his vessel, apparel, freight, &c.

(Signed,)

JAMES CRUSET,

JOHN I. MATTISON."

"Before me, FRANCISCO A. GORNEZ, licensed broker.

Monte Video, May 2nd 1839."

"Note.—Twenty of the days limited above, for the loading and discharge, were consumed in *Monte Video*, leaving only for the discharge in *Havana* sixty days, (60.)

(Signed,)

FRANCISCO A. GORNEZ.

JAMES CRUSET.

Monte Video, July 13th 1839."

"The above is a correct translation of the document referred to me for translation.

S. TEACKLE WALLIS.

15th June 1843."

Which it was admitted was executed by the parties hereto. That the voyage therein stipulated to be performed by the *Eliza Davidson*, (the brig mentioned in the policy of insurance,) was performed by him to *Havana*, and the freight of \$5,000 earned by her, and paid to the owners; and that said voyage to *Havana*, was a shorter voyage than would have been that to

Boston, and on the way home, to the port of *Baltimore*, of said brig, where she belonged.

The plaintiffs then offered in evidence the deposition of *Shadrach Hudgins*: that he was mate of the brig *E. D.* on her voyage from *M. V.* to *C. C.*, and from thence to *Boston*, to be performed under a charter party. The voyage commenced in the beginning of the year 1839, and at *M. V.* they took in a cargo for *Corrientes*, and proceeded to *Corrientes*, where the cargo was landed, and they commenced taking in a cargo for *Boston*; and when they had taken in a part of the cargo, about one-fourth, they were seized by a *French* corvette, and all the crew removed to the corvette, and the brig taken possession of by the *French*. The *French* did a great deal of mischief to the said brig; left all her boats ashore; broke the windlass; destroyed the greater part of the running rigging; and the vessel was brought as a prize to *M. V.* He further states, that the crew and vessel were detained about ten days in *M. V.*, before they were released; as he understood at the time, *C.* was declared in a state of blockade, and said brig was prohibited from going there. After their release, they remained in *M. V.* upwards of forty days, when the said vessel got a freight for *Havana*. In consequence of this declaration of blockade, the voyage to *Boston* was broken up. The blockade continued for two years afterwards.

Cross examined. Witness understood that the freight for *Havana*, amounted to \$4,000. At *M. V.*, the windlass was mended; did not get new sails; had a carpenter employed about a week mending the windlass, and doing some caulking; the caulking was not occasioned by the blockade. They did not know that *B.* was about to be blockaded before they went there, on the contrary, all the consuls there, except the *French* consul, said that it was not in a state of blockade. The *French* were, at that time, blockading *Buenos Ayres*. No application was made by him, or by the captain, to his knowledge, to the *French* consul, to ascertain the condition of the war, or whether *Corrientes* was blockaded. He knew that the cargo they had in had come from *Buenos Ayres*.

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Examined in chief. Deponent states that the *French* were blockading the river *Plate*; that *Corrientes* is not in the river *Plate*, but 60 miles south of *Cape Antonio*; that in unlading the outward cargo, and taking in a part of the inward cargo, they were occupied nineteen or twenty days, during all which time, they never saw a *French* vessel of any kind; that they knew that the *French* were carrying on a general war with *Buenos Ayres*.

Cross examined. Deponent heard from *Mr. Corner* or *Mr. Glenn*, that the whole matter had been compromised.

Examined in chief. Deponent states that one part of the *French* fleet were above *Monte Video*, and the other off *Monte Video*; they saw no vessels below *Monte Video*.

Whereupon, the plaintiffs prayed the court to instruct the jury as follows :

1st. That the true construction of the policy of insurance, given in evidence in this case, is, that the defendants assured the risk of loss arising from restraints and detentions of all kings, princes or people, and were of course liable for the loss arising from the capture and detention of the brig by the *French* vessel of war, "the *Perle*."

2nd. The true construction of the charter party of *Peabody*, also offered in evidence, is, that no freight was to be due by the charterer, unless the voyage undertaken was performed, and the goods safely delivered at the termination of the voyage at *Boston*, and this, notwithstanding it was prevented by the said capture and detention of the *Eliza Davidson*, by the said *French* vessel of war.

3rd. That as the *Cape Corrientes* was blockaded on and after the *Eliza Davidson* was released at *Monte Video* from the capture and detention of said vessel of war, it was impossible for the vessel to earn her freight under said charter party, and that therefore the policy of insurance in question was forfeited, and the plaintiffs are entitled to recover.

And the defendants prayed the court to instruct the jury as follows :

1st. The defendants in the above cause, prays the court to instruct the jury, that if they shall find from the evidence, that on the 1st day of January 1839, the defendant executed the policy of insurance offered in evidence in this cause, that on the 1st day of February 1839, the charter party offered in evidence, was entered into by *Capt. M.*, the master of the *E. D.*; that in pursuance thereof, the said brig proceeded to *C. C.*, and there discharged her outward cargo; that whilst engaged in taking on board the lading stipulated by the charterer to be furnished for transportation to *B.*, said brig was seized by the *French* brig of war, the *Perle*, and by her held from the 16th of March 1839, till the 25th day of the same month, when said brig *E. D.*, was surrendered to *Capt. M.*, who, with his crew, took possession of the same; that at the time of her seizure by the *French* brig, said brig, *E. D.*, had on board of her one-fourth of the cargo stipulated by the charterer, to be furnished for transportation to *B.*; that being in that condition, the master of said brig demanded of the charterer, (who insisted upon breaking up the contemplated voyage, upon the ground, that the port of *C. C.* was declared by the *French*, to be in a state of blockade,) the full amount of the freight stipulated for in the charter party of the 1st of February, 1839; that said charterer refusing to pay the same, the matter was submitted by the said master and the charterer to arbitration; and that the arbitrators chosen by the parties, awarded \$1,200 to be paid by the charterer, as a compensation for what had been done under said charter party, which was accepted by said *M.*; and that said charter party, by the mutual consent of the said master and the charterer, was thereupon cancelled; that said brig, *E. D.*, afterwards, to wit, on the 2nd May 1838, was chartered for a voyage to *Havana*, at and for the freight of \$5,000, as shown by the charter party offered in evidence, and that said brig performed said voyage, which was a shorter voyage than that from *M. V.* or *C. C.* to *B.*, and received the freight stipulated to be paid them; and shall further find that said master, *Mattison*, at the time said policy of insurance was effected, and during the whole period covered by the transactions here-

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inbefore recited, was a part owner of said brig, *Eliza Davidson*, and still is such part owner, that then the plaintiffs are not entitled to recover in this action, on the first count in their declaration.

1st. Because no loss of freight was sustained by the plaintiffs, upon the voyage, covered by the policy of insurance, within the terms of said policy, or the perils thereby insured against.

2nd. Because upon the true interpretation of the charter party, of the 1st February 1839, the charterer, *A. Peabody*, was answerable, under the circumstances above stated, for the whole amount of freight stipulated to be paid by *A. Peabody*, upon the voyage to *Boston*, and that *Captain Mattison*, one of the owners of said brig *E. D.*, having consented to the cancellation of said charter party, and thereby discharged the said *Peabody* from his obligation to fulfil it, has released the defendant from all responsibility, upon the policy offered in evidence in this cause.

3rd. Because the reference and adjustment at *M. V.* having been made, without the knowledge or consent of the defendant, and having been followed by the cancellation of that charter party, with the consent of one of the assured, *M.* being a part owner of said brig, discharged the defendant from all liability upon said policy.

4th. Because under the circumstance stated, the said owners of said brig *E. D.*, laid a claim for full freight, under said charter party, and that having on board one-fourth of the homeward cargo, they had a lien on it for said freight, and that it was their duty to have prosecuted their voyage to *B.*, after the time limited by said charter party, for the lading of said vessel, and that having relinquished said lien, in the manner shown by the evidence, the defendant was discharged from all liability on said policy.

5th. Because by the second charter party offered in evidence, the said plaintiffs, within the period necessary to perform the voyage under the first, having carried freight to a larger amount

than is claimed in the present suit, sustained no damages, which they are entitled to exact in this suit.

6th. The defendant prayed the court, further to instruct the jury, that even if the plaintiffs are entitled to recover in this case, that being the owners of but two-thirds of said vessel, the *E. D.*, they are entitled to recover but two-thirds of the amount due upon the policy of insurance declared upon, after deducting the sum of twelve hundred dollars, received from *A. Peabody*, notwithstanding that they have sued for the whole amount so due.

And the court, (MAGRUDER, A. J.,) thereupon gave to the jury, the instructions prayed for by the plaintiffs, and rejected those prayed for by the defendant. The defendant excepted to the said opinion of the court, granting the prayers of the plaintiffs, and to each of them, and to the said opinion rejecting the prayers of the defendant, and to each of them.

The *Insurance Company* prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS and MAGRUDER, J.

By Z. COLLINS LEE and NELSON for the appellants, and
By REVERDY JOHNSON for the appellees.

CHAMBERS, J., delivered the opinion of this court.

The instructions asked by the appellee, who was plaintiff below, were not based on an assumed state of facts, to be submitted to the consideration of the jury. They were moved, it would seem, in the confidence, that as the evidence was uncontradicted, the jury could not do otherwise than find the facts accordingly.

They are, in effect, an assertion by the court, in the first and second instructions, that the *Eliza Davidson* was captured and detained by the *Perle*; and in the third instruction, that *Corrientes* was blockaded on and after the ship's release at *Monte Video*. Doubtless the jury would have found these facts according to the testimony, but the sufficiency of evidence to satisfy a jury, or the circumstance, that it is all on one side,

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does not authorise the court to direct the jury, that it proves the fact. They have the power to refuse their credit, and no action of the court should control the exercise of their admitted right, to weigh the credibility of evidence. In thus incautiously expressing their opinion, the court erred.

The appellants deny the right of the appellee, to recover on the state of facts set out in the defendant's first prayer, on various grounds.

The first four reasons assigned in the record, are based upon the assumption, that the ship was entitled to full freight, and might have earned it by proceeding on the voyage, with the part of her cargo received, when she was seized and driven off.

If the construction given to the charter party by the appellants, could be adopted, this objection must be sustained. That construction is, that *Peabody*, the charterer, under the circumstances which occurred, was answerable for the whole amount of freight, which would have been earned by the successful prosecution and termination of the contemplated voyage. Was such the meaning of the charter? It is to be construed as other contracts, so as to effect the design of the parties, apparent by its terms. The evidence is, that about one fourth of the cargo was taken in at *Corrientes*; and there is no allegation of unwillingness, or want of readiness or preparation, on the part of the charterer, to furnish the residue of the lading. It would, therefore, seem to require very explicit language to justify the inference, that in such a state of things, the charterer intended to pay full freight. If it can be demanded in a case where an enemy's force, by seizing and driving away the ship, after receiving one fourth part only of the cargo, why may it not be in a case, where one hundredth part only is taken in? If full freight is due, where, by a hostile force, the ship is prevented from loading more than a very minute portion of the cargo, why not, if, after receiving a full cargo, a hostile force were to seize and carry off a very large proportion of the cargo, before the ship had left her port of lading? In these cases, full freight certainly could not be

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charged. We think the apparent intent of this charter party, was, that “a full and complete cargo” should be received on board at *Corrientes*, and delivered at *Boston*, to entitle the owner to full freight; and that in the event, which actually happened, it was at least doubtful, whether the charterer could have been compelled to pay any freight on the small portion of the cargo received, and which was violently seized, and taken to *Monte Video*. We think the appellants have no cause, therefore, to complain of the adjustment between *Peabody* and *Mattison*.

The next reason assigned, is, that the freight which was actually earned and received, on the voyage from *Monte Video* to *Havana*, or so much of it as would repay the loss claimed by the appellees, ought to be applied as *salvage*, to the relief of the underwriters, in this case.

It is rightly argued, that the contract of insurance is one of indemnity, and the doctrine of *salvage* for freight, has been introduced as a fair item in the adjustment of actual loss. If therefore, the particular freight, that is to say, the freight on the particular cargo contemplated in the policy, be not earned, but other freight be earned in the same voyage, the insurer will only be liable for the difference, because, that is the extent of actual loss by that voyage. No case, however, has extended the doctrine so far as is now claimed. This is not the case of a suspended voyage, afterwards pursued, nor is it the case of a prosecution of the same voyage, with a different cargo. The first voyage was completely and finally broken up and ended, in consequence of the ship's being driven off from the port of lading, and without a prospect of permission to return. Time had elapsed sufficient for the completion of the original voyage, when, at a different port from that of her intended lading, she received a different cargo, for a different destination, on which she earned freight.

There must be some limitation, in regard to time, as well as distinction, in the application of this doctrine. It cannot be required, that a ship shall remain, year after year, awaiting the restoration of peace, or removal of an embargo, so as to allow

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her to return to her original port of lading; or to remain, for any indefinite period, waiting for a cargo to her port of destination. The inconvenience, not to say ruinous consequences of such a doctrine, are too manifest to require detail. In like manner, it would be quite impossible to maintain, on principles of policy, or by authority, that the first subsequent voyage, whatsoever might be the port of lading or of destination, must be made subject to this claim for *salvage*, on the freight of the interrupted voyage.

Great difficulty may be found in ascertaining the precise limits, within which the doctrine should be applied; but we do not think, that any adjudged case will authorise us to include this within its letter or spirit.

The fifth reason is subject to the additional exception, noticed in considering the prayers of the appellees. The time in which either of the voyages alluded to, should be performed, is a question of fact, and not to be assumed and asserted by the court.

The last objection stated in the record, respects the right of the plaintiffs below, to recover more than the proportion, in which they were owners. This, we think, was rightly abandoned, as altogether untenable. See *Phil. on Ins.* 593, and the numerous cases there cited.

The result is, we concur with the court below, in their several opinions on the instructions asked for by the appellants below, but differ from that court, in respect to the opinions expressed on the prayers of the appellees, the plaintiffs below.

JUDGMENT REVERSED AND PROCEDENDO ORDERED.

Randall vs. Glenn.—1844.

BEALE RANDALL vs. JOHN GLENN.—*December 1844.*

Where the plaintiff's demand is set forth in a general count, as for money lent, &c., the defendant may, at any time, before he has pleaded to the merits, call on the plaintiff to exhibit the particulars of his claim.

After pleading to the merits, it seems to be too late to object to the want of a statement of the particulars of the plaintiff's demand, or that the same is defective.

At the term to which an action was brought, the defendant demanded a bill of particulars, which the plaintiff furnished; several terms afterwards, the defendant pleaded the general issue; at the next term, when the cause was called for trial, the defendant excepted to the sufficiency of the statement. This objection came too late.

The motion, to direct an amendment of a bill of particulars, filed in due time, made after plea, pleaded to the merits, at the trial term, is addressed to the sound discretion of the court; and therefore is one from which an appeal does not lie, any more than it will on a refusal to grant a new trial.

Where parties submit matters in controversy, for the purpose of a final determination, and the arbitrators make an award, the original contract or cause of action is merged by the submission and award; and there is no distinction, in this respect, between submissions by parol, and by bond.

There is a distinction between a submission by parties to the judgment of two or more individuals who are to decide the controversy, and a reference of a collateral, incidental matter of appraisement, or calculation, or the submission of a particular question, forming only a link in the chain of evidence, not calculated to put an end to controversy.

The recital in a mortgage executed and delivered by *R.* to *G.*, that he stands indebted to *G.* in a large sum of money, for advances, the amount of which is to be ascertained upon examination of their accounts by *J.* and *M.*, mutually appointed by *R.* and *G.*, for that purpose, is a reference of a mere matter of calculation, and ascertainment as to the amount of money advanced; an ascertainment in conformity to such recital does not merge the original contract.

An ascertainment of the amount due, under such circumstances, is competent evidence, in an action of debt brought by *G.* against *R.*, for money lent, advanced, had, and received, under the plea of *nil debet*, as an admission of the defendant of the amount due the plaintiff.

APPEAL from *Baltimore County Court.*

This was an action of *debt*, commenced on the 29th April 1841, by the appellee against the appellant.

The writ was for \$25,800, in the *debet* and *detinet*, and the declaration complained, for that whereas the said defendant,

on the 26th April 1841, at *Baltimore*, to wit, at the county aforesaid, was indebted to the said plaintiff, in the sum of \$18,120.60, for so much money, before that time lent and advanced, by the said plaintiff to the said defendant, at his special instance and request; to be paid by the said defendant to the said plaintiff, when he, the said defendant, should be thereto afterwards requested. Whereby, and by reason of the said last mentioned sum of money, being and remaining wholly unpaid, an action hath accrued to the said plaintiff, to demand and have, of and from the said defendant, the sum of \$18,120.60, parcel of the said sum, above demanded. And whereas also, afterwards, to wit, on the day and year last aforesaid, to wit, at the county aforesaid, the said defendant was indebted to the said plaintiff, in a certain other sum of money, to wit, the sum of \$7,679.40, for so much money, before that time had and received by the said defendant, to the use of the said plaintiff, and to be paid by the said defendant to the said plaintiff, when he, the said defendant, should be thereunto requested. Whereby, and by reason of the said last mentioned sum of money, being and remaining wholly unpaid, an action hath accrued to the said plaintiff, to demand and have, of and from the said defendant, the said last mentioned sum of \$7,679.40, other parcel of the said sum, above demanded. Yet the said defendant, although often requested so to do, hath not, as yet, paid the said sum of \$25,800, above demanded, or any part thereof to the said plaintiff. But he, to do this, hath wholly refused, and still doth refuse, to the damage of the said plaintiff, in the sum of seven thousand six hundred and seventy-nine dollars and forty cents, and therefore, &c.

At the return term of the writ, the said *Beale Randall* demanded of the plaintiff, a list of particulars of his claim. It was ordered by the court, on motion of the said *Beale Randall*, that the said *John Glenn* do deliver to the said *Beale Randall's* attorneys, or file in court here, the particulars of the claims for which this suit is brought, and in the meantime, that all proceedings in this case be staid. The plaintiff thereupon filed in court, the following bill of particulars, to wit:

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“*John Glenn vs. Beale Randall*, in *Baltimore* county court. Plaintiff’s bill of particulars. For monies advanced by the said *John Glenn* to the said *Beale Randall*, at his instance and request, at various times, up to the 16th May 1834, amounting to \$18,120.60. Interest on the same, from 16th May 1834, till paid. J. MASON CAMPBELL, plff’s att’y.

Which said bill was endorsed, to wit: “service copy admitted 18th May 1841. JAS. M. BUCHANAN, att’y for def’t.”

The defendant then pleaded, that he does not owe the said plaintiff, the said sum of money above demanded, or any part thereof, &c., and of this, he puts himself upon the country, &c.

Upon this issue, the jury awarded the plaintiff the sum of \$22,534.62, and judgment was accordingly entered against the said *Beale Randall*, on the 16th December 1842.

1ST EXCEPTION. When this case was called for trial, at September term 1842, the defendant moved the court, to stay all proceedings therein, because the plaintiff had not complied with the demand made by defendant, on the 7th May 1841, of the particulars of the plaintiff’s claim, by his paper filed as such bill of particulars, and served on the defendant on 18th May 1841, which motion the court, (PURVIANCE, A. J.,) overruled, being of opinion, that the defendant has waived his right, now to object to the paper filed by the plaintiff, as the particulars of the claim, by not taking exception thereto before the time of trial, and pleading to the *nar.*, after the filing of such paper, as a bill of particulars, to wit, on the 30th August 1841. The defendant excepted.

2ND EXCEPTION. The plaintiff to support the issue on his part, offered to read in evidence to the jury, a paper writing, purporting to be an agreement, to submit to the ascertainment of *R. Johnson* and *J. W. McCulloh, Esqs.*, the amount of money due by the defendant to the plaintiff, for advances, as therein set forth, according to the language of said paper, (it being admitted, that said paper writing was signed and delivered by the defendant to said *Glenn*, as such submission on his, defendant’s part, and that said *Glenn* agreed to such submission, and it was made accordingly.) And the plaintiff fur-

ther offered in evidence to the jury, a paper writing, admitted to have been signed by the said *R. Johnson* and *J. W. McCulloh, Esqs.*; as of the date it purports to have been signed, purporting to ascertain the amount so due; and it was admitted, that the defendant and plaintiff had notice of the meetings of said referees, and by themselves, or agents, attended said meetings, and admitted notice of the said ascertainment, by said paper writing. The defendant then objected to the admissibility of said paper writings in evidence, under the pleadings in this cause.

1. Because said paper writings were, in point of law, a submission to arbitration, and an award; and the said reference and award are not declared upon in this case.

2. Because the said paper writings, and other testimony and admissions above mentioned, are not evidence, under the *first* count in the *nar*.

3. Because the paper writings, and other testimony and admissions above mentioned, are not evidence, under the *second* count in the *nar*.

4. Because the said agreement to refer, and the said ascertainment, constitute no cause of action for the plaintiff against the defendant, and contain no promise or agreement on the part of the defendant, to pay such amount, or any amount to the plaintiff, but only a pledge of certain funds, to the discharge of such amount, as might be so ascertained. Each and every of which said objections, were over-ruled by the court, and the court permitted the said papers to be read in evidence to the jury, by the plaintiff, as evidence, under the *first* count in the *nar*, of an ascertainment and admission of the amount due by the defendant to the plaintiff, for advances made, as set forth in the *nar*, and said papers. The defendant excepted to the said refusal, and to the said direction.

The verdict and judgment being against him, he appealed to this court.

The record was amended in this court, by consent, and the following documents referred to in the 2nd exception, admitted, as having been given in proof in the county court.

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“Whereas, *Beale Randall*, of the city of *Baltimore*, stands indebted unto *John Glenn*, of the same place, in a large sum of money for advances, the amount of which, is hereby to be ascertained upon an examination of their accounts by *Reverdy Johnson* and *James W. McCulloh, Esqs.*, mutually appointed by the said *Beale Randall* and *John Glenn*, for that purpose.

And, whereas, the said *Glenn* hath come under the following responsibilities for account of the said *Randall*, to wit, at the *Marine Bank of Baltimore*, for the sum of seven thousand dollars, (\$7,000,) &c. The advances made by the said *Glenn*, for account of the said *Randall*, as claimed by the said *Glenn*, amounted, on the sixth day of April last, to \$18,126.60, and for the purpose of securing, indemnifying, and saving harmless, the said *Glenn* from all loss and damage on account of the premises, the said *Beale Randall* hath agreed to execute these presents. Now this instrument of writing witnesseth, that the said *Beale Randall*, for and in consideration of the premises, and of the sum of five dollars, current money, to him in hand paid by the said *John Glenn*, before, &c., hath granted, bargained and sold, assigned, &c., and by these presents doth grant, &c. To have and to hold the same, and every part and parcel thereof, unto the said *John Glenn*, his heirs, executors, administrators and assigns forever, in special trust and confidence, nevertheless, that is to say, in trust to retire, and pay all and singular, the responsibilities herein before mentioned; then to pay all such sums of money as the said *Reverdy Johnson* and *James W. McCulloh, Esqs.*, may ascertain and determine, the said *Glenn* has advanced for the said *Randall*, and the balance, if any, to pay over to the said *Randall* or his order.”

This instrument dated 16th May 1834, was duly acknowledged, &c., on the day of its date.

“In pursuance of the authority given us by the within mortgage to ascertain the advances, in money, made by the within named *John Glenn*, to the within named *Beale Randall*, up to the date of said mortgage, and after having given to said *Glenn* and *Randall* notice of the times and places of our meetings,

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for said purpose, and having fully heard and considered all the evidence and representations they had to offer us in the matter, we do award, determine and ascertain, that said *John Glenn* had, on the day of the date of said mortgage, that is to say, on the 16th day of May 1834, advanced, in money, to said *Randall*, the sum of eighteen thousand, one hundred and twenty dollars, and sixty cents, (\$18,120.60,) over and beyond the amount of the three notes, specially mentioned in said mortgage. And we do further award and determine, that said sum of \$18,120.60, exclusive of said notes, is now due by said *Randall* to said *Glenn*, with interest on the same, from the 6th day of April, in the year 1834. As witness our hands, this 12th day of May, in the year 1835.

Signed,

REVERDY JOHNSON,

JAMES W. McCULLOH.

Notes mentioned \$7,000, at *Marine Bank, &c.*"

The defendant prosecuted this appeal.

The cause was argued before ARCHER, C. J., SPENCE and MAGRUDER, J.

By MURRAY and T. P. SCOTT for the appellant, and

By GLENN and CAMPBELL for the appellee.

SPENCE, J., delivered the opinion of this court.

The declaration in this case, has a count for money lent and advanced, and money had and received. The suit was brought to the May term 1841, of *Baltimore* county court. At May term 1841, of the same court, the defendant demanded a list, or bill of particulars, and the court passed an order upon the the plaintiff, that he deliver to the said *Beale Randall's* attorneys, or file in the court, the particulars of the claim for which the suit was brought; and in the meantime, that all proceedings be staid. And thereupon, the said *Glenn*, by his attorney, filed in court, the following bill of particulars, to wit:

"In *Baltimore* county court, plaintiff's bill of particulars, for money advanced by the said *John Glenn* to the said *Beale Randall*, at his instance and request, at various times, up to

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16th May 1834, amounting to \$18,120.60.” “Interest on the same, from 16th May 1834, until paid,” which said bill is thus endorsed, to wit: “service copy admitted 18th May 1841.”

After the service of this bill of particulars was thus admitted, the defendant pleaded *nil debet*; the plaintiff joined issue, and the cause was continued from term to term, until September term 1842. The first exception in this case, raises the first question to be decided by this court; and inasmuch as the defendant’s motion fully presents the question, we insert it as follows:

“When this case was called for trial, the defendant, by his attorney, moved the court to stay all proceedings in the cause, because the plaintiff had not complied with the demand made by the defendant, on the 7th of May 1841, of the bill of particulars of the plaintiff’s claim, by his paper filed as such particulars, and served on the defendant on the 18th of May 1841, which motion the court over-ruled.”

The law seems well settled upon authority, that in actions of this class, the defendant may at any time before he has pleaded to the merits, if the declaration do not disclose the particulars of the plaintiff’s demand, call on plaintiff to exhibit them. *Vide Mercer vs. Seyer*, 3 Jno. Rep. 248. But it seems to be too late, after pleading to the merits, to object to the want of such a statement, or that the same is defective. *Long vs. Kinard*, *Harper Consti., C. of S. Carolina* 47.

In the case now under consideration, after the defendant had service of the bill, he filed his plea, and issue was joined, and the cause continued until September term 1842; and not before the cause was called for trial, did the defendant make the suggestion, that the plaintiff had not complied with the demand made of the particulars of his claim. This application of the defendant, at this stage of the case, after issue joined, and when the cause was called up for trial, for a continuance of the cause, might be considered as addressed to the discretion of the court, and we concur with the opinion of *Gibbs, C. J.*, in *Lovelock vs. Cheveley* 3, *Eng. Com. Law Rep.* 185, where he says, “bills of particulars undoubtedly facili-

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tate the trial of a cause, but they must not be permitted to obstruct the justice of it. The party who objects to particulars, as insufficient, must make his complaint at the proper time. He cannot wait till the trial of the cause, and then raise an objection, which, if earlier made, might have been disposed of. In this case, if the plaintiff had not time to tax the bill, he might have applied to the court, but by keeping the particulars, he has waived his objection." So in the case under consideration, if the defendant deemed the plaintiff's bill of particulars insufficient, he should have made his motion earlier, when the defect, if there were any, might have been remedied, and the delay of the trial of the cause avoided; whereas by his delay, he has rendered himself obnoxious to the charge of having waived his objections. This was a matter in the sound discretion of the court, under all the circumstances of the case, and therefore, one from which an appeal does not lie, any more than it will on a refusal to grant a new trial.

At the trial of this cause, the plaintiff offered in evidence to the jury, a certain paper writing, purporting to be a mortgage from *Beale Randall* to *John Glenn*, which contained the following recital:

"Whereas *Beale Randall*, of the city of *Baltimore*, stands indebted unto *John Glenn*, of the same place, in a large sum of money for advances, the amount of which is to be hereby ascertained, upon an examination of their accounts, by *Reverdy Johnson* and *James W. McCulloh, Esqs.*, mutually appointed by the said *Beale Randall* and *John Glenn*, for that purpose," it being admitted, that said paper writing was signed and delivered by the said defendant, to said *Glenn*, as such submission on his, defendant's, part, and that said *Glenn* agreed to such submission, and it was made accordingly. And the plaintiff further offered in evidence to the jury, a paper writing, admitted to have been signed by the said *R. Johnson* and *James W. McCulloh, Esqs.*, as of the date it purports to have been signed, purporting to ascertain the amount so due. It was also admitted, that the parties had notice of the meeting of the referees, and by themselves, or agents, attended

said meeting, and admitted notice of the said ascertainment, by said paper writing.

The defendant then objected to the admissibility of said paper writing in evidence, under the pleadings in this cause; which objection the court over-ruled, and permitted the evidence to go to the jury.

Our next enquiry is, therefore, whether there was error in this act of the court?

The ground of objection to the admissibility of this evidence was, first, that there was no count in the declaration under which it was admissible; that in order to let it in, there should have been a count on the award, or an account stated; that the original contract was merged in the reference and award.

The doctrine is too well settled at this day, to admit a doubt, that where parties submit matters in controversy, for the purpose of a final determination, and the arbitrators make an award, in such a case, that the original contract, or cause of action, is merged by the submission and award. It is true, that in *England*, the courts have, and do profess to make a distinction between submissions by parol, and by bond; but the *American* cases, so far as we have been able to ascertain, do not profess to hold this distinction.

The mortgage in this case recites, that whereas *Beale Randall*, of the city of *Baltimore*, stands indebted to *John Glenn*, of the same place, in a large sum of money for advances, the amount of which is hereby to be ascertained, upon an examination of their accounts, by *Reverdy Johnson* and *James W. McCulloh, Esqs.*, mutually appointed, &c.

There is a distinction between a submission by parties of matters in controversy, to the judgment of two or more individuals, who are to decide the controversy, and a reference of a collateral, incidental matter of appraisement, or calculation, or the submission of a particular question, forming only a link in the chain of evidence, not calculated to put an end to controversy. *Vide 4 vol. Cowens, Philip's 1, note 240, p. 149. Garr vs. Gomez, 9 Wend. 649.*

Richardson vs. the State, use of Rawlings.—1845.

We hold, that the reference in this case, was a mere matter of calculation and ascertainment, as to the amount of money which had been advanced by *Glenn* to *Randall*, which the mortgage was intended to secure; that the reference and ascertainment did not merge the original contract; and that as an admission of the defendant, it was admissible in evidence, under the pleadings in this cause, of the amount due the plaintiff. *Keen vs. Butshore*, vide 1 *Espi.* 193. And *King vs. Butshore*, 1 *Peakes*, N. P. C. 227.

JUDGMENT AFFIRMED.

CHARLES RICHARDSON, A. D. B. N. OF ROBERT R. RICHARDSON, vs. THE STATE OF MARYLAND, USE OF THOMAS RAWLINGS.—June 1845.

In an action on a bond given by a trustee, appointed under a decree in equity, "well and truly to execute the trust reposed in him by the said decree, or which shall be reposed in him by any future decree or order in the premises," brought for the use of a party, to whom a portion of the proceeds of the property sold by such trustee had been ordered to be paid, to recover the same, it is not competent for such trustee to question the correctness of the original decree for a sale; or the order relative to the distribution of the purchase money.

If there was any error in the proceedings in Chancery, of which the trustee had any right to complain, he might have appealed therefrom.

It is the duty of a trustee, acting under a decree for a sale, as soon as an order has passed distributing the proceeds thereof, and he has received the same, either to pay over the fund to the party directed to be paid, or carry the same into court.

For money detained against such duty, the jury may give interest, by way of damages.

APPEAL from *Baltimore County Court*.

This was an action of *debt*, brought to May term 1842, by the appellee. The declaration assigned a breach of the condition of a bond of *Robert R. Richardson*, dated 22nd January 1821, given as a trustee of the Court of Chancery, under a decree to sell certain real estate. The defendant pleaded *nil debet*.

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The plaintiffs, to support the issue on their part, offered in evidence the record of the proceedings of the Court of Chancery, in the cause in which the bond declared on was given, and then closed their case. These proceedings are sufficiently set forth in the opinion of this court.

This record contained an audit of the account between the estate of *Thomas Richardson, deceased, Dr.*, with *Robert R. Richardson, trustee, Cr.*, dated 10th February 1821, in which *Thomas Rawlings* was allowed \$214.79, ratified on the 10th May 1821.

The defendant, for the purpose of proving a payment on account of the amount appearing to be due to the *cestui que use* of the plaintiffs on the above record, offered in evidence the following paper:

1821—May 10. To <i>Thomas Rawlings</i> , as pr. au-				
	ditor's acc't.	-	-	- \$214 79
	Interest to 10th May 1836, 15 yrs.			193 50
				<hr/> 408 29
1836—May 10. By cash paid,		-	-	- 200 00
				<hr/> 208 29
	To in't. to Jan'y 15th 1841, 4			
	yrs., 8 ms. and 5 ds.,	-	-	58 41
				<hr/> \$266 70

Which it was admitted was an account made on behalf of the *cestui que use*, and furnished to the defendant's testator, and here closed their testimony.

1st. The defendant prayed the court to instruct the jury, that the plaintiff's *cestui que use* was not entitled to the legacy mentioned in the will in the said record, until he arrived at the age of twenty-one years, and that he is not entitled to interest on said legacy prior to his majority, unless the jury shall believe that the defendant used the money for his own benefit in the interim, of which there is no evidence in the case.

2nd. That the *cestui que use* aforesaid, is not entitled to interest on the said legacy until there is a demand therefor, and

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that there is no evidence of demand prior to 10th June 1836, and that the charge of interest in the said account offered by the defendant to prove the payment of the sum of \$200, does not entitle the plaintiff to the interest there charged, unless the jury shall believe, that prior to such demand, the defendant used the said legacy for his own benefit, of which there is no testimony in the cause.

The court, (PURVIANCE, A. J.,) refused to give these instructions, and the defendant excepted.

The defendant below prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By LATROBE for the appellants, and

By DAVID STEWART for the appellees.

MAGRUDER, J., delivered the opinion of this court.

The intestate of the plaintiff in error was appointed, by the Chancellor, trustee to sell certain property, and upon his bond, the condition of which, required him to execute the trust reposed in him by the decree, or which shall be reposed in him by any future decree or order in the premises, this suit was instituted. The plaintiff below, in his declaration, set forth the cause of action. After reciting the decree, the execution of the bond, the sale of the premises, report of the trustee, and confirmation of the sale, it states, that the auditor of the court, by order of the Chancellor, did state an account, and on the 10th May 1821, reported, that of the proceeds of sale, the person, for whose use this suit is brought, was entitled to \$214.79. The report was confirmed by the Chancellor, who ordered, that the proceeds of sale, so as aforesaid made, be applied accordingly, with interest, as it had been, or might be received. It is, then, alleged, that on the 6th day of March 1828, the trustee received and collected, of the purchaser of the premises, the principal, and a further sum for interest then due, which, by the terms of the decree, he, the trustee, ought to have brought into court to be applied, and the portion to

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which *Rawlings*, the *cestui que use*, was entitled, to be paid to him. For the non-payment of the sum ascertained, by the Chancellor's order, to be due to this *cestui que use*, with the interest thereon, this suit was brought.

A verdict being obtained by the plaintiff, the defendant below appealed. The bill of exceptions taken in the case, discloses to us every thing, which we can know to have taken place in the course of the trial.

Whether the proof entitled the plaintiff below to a verdict at all, and if it did, for what sum? Whether the jury gave too much, or too little for damages? are not the questions which we are to decide.

From the decree of the Chancellor, or from any order which the Chancellor passed in the case, no appeal was ever prayed.

Ought the court to have given the instructions which the defendant below asked, or either of them? The first prayer is, that the plaintiff is not entitled to the legacy mentioned in the will in the said record, until he arrived to the age of twenty-one years, and that he is not entitled to interest on said legacy, prior to his majority, unless the jury shall believe, that the defendant used the money for his own benefit, in the interim.

We can discover no error in the refusal, by the court below, to give this instruction, whether the original decree was correct, or whether the Chancellor erred in the order which he passed, relative to the distribution of the purchase money, were questions not before the court below, and which certainly could not be raised by *him*, who took upon himself the burthen of executing the decree, and who was bound, by the terms of the condition of his bond, to execute the trust reposed in him by the decree; or which might be reposed in him by any future decree or order in the premises. If there was any error in the proceedings, of which the trustee had a right to complain, he might have appealed therefrom; no such appeal having been taken, it is no defence in this action upon the bond, for not performing the order of the Chancellor, that the Chancellor's order is not correct. The matter which this prayer brought before the court, was without the issue.

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Nor does there appear to have been committed by the court below, any error in rejecting the second prayer. The order of the Chancellor was passed the 10th May 1821 ; and the suit was instituted in 1842. The trustee's duty, as soon as the order was passed, and the money was received by him, was to pay it over to the parties, or to carry it into the Court of Chancery. Surely the jury might give interest, by way of damages, for the detention of the money; and in ascertaining the sum yet due, were not bound to refuse to allow interest until the time mentioned in the prayer. Indeed, the proof furnished by the defendant shows, that he could not ask to be released from the payment of interest until the 10th June 1836, mentioned in his prayer.

It is not for this court to judge, whether the evidence warranted a verdict for the plaintiff; no exception taken in the case, brings such a question before us; possibly the jury were governed entirely by the defendant's own testimony. This court can see nothing in the refusal by the court below to give the instructions which were asked, which will authorize them to send the case back for a second trial.

Something was said, in the course of the argument, about a claim of the defendant's intestate for supporting the children. It is possible, that the Chancellor might have allowed such a claim, and directed it to be deducted from the interest, which, from time to time, the defendant's intestate received. But even if the defendant's intestate had a just claim, yet as he did not exhibit it at the right time, and in the proper court, this court is not at liberty, for that reason, to reverse the judgment of the court below.

JUDGMENT AFFIRMED.

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THE MAYOR AND CITY COUNCIL OF BALTIMORE *vs.* HENRY WHITE.—June 1845.

The tenant in fee of a lot binding on the basin of the city of *Baltimore*, leased the same for a term of years, reserving a right to distrain and re-enter; and granted his lessee "the exclusive right of extending, not exceeding, &c., into the water, any and every part of said lot which fronted the basin, provided he could obtain permission for that purpose, from the *Mayor &c. of Baltimore*, or the legislature of the *State*. The reversion of this lot was sold to *O.*, who recovered the leased premises by ejectment for non-payment of rent, and applied to the corporation of *B.* for liberty to extend the lot into the basin, according to the original lease, which was granted, and the extension made. **HELD:**

- 1st. That the right to make the improvement, and it, when made, did not remain in the heirs of first tenant in fee, who leased it.
- 2nd. By the sale of the reversion to *O.*, all the right of the original tenant in fee, both in the lot, and the permission to extend the same, as granted by the lease, vested in *O.*
- 3rd. By the forfeiture of the lease, consequent upon the recovery in ejectment, no right reverted to the first tenant.
- 4th. That if the lessee had made the improvement under the permission granted by his lease, the lessors and his assigns could have distrained or re-entered upon it, as upon the original lot.

The permission granted by the *Mayor and City Council of Baltimore*, to extend an improvement into the water, to an owner of a lot adjacent thereto, is not within our registration system.

That system sanctions no conveyance of, or incumbrance upon real property, created by matter in *pais*, or resting in parol.

The means by which a wharf is erected, under the act of 1745, in the city of *Baltimore*, and appropriated to the public use, form a part of the paper title, the record evidence, which must be resorted to, and examined, to trace the right to such property; no patent issues, but the title must conform to the acts of 1745, ch. 9; 1783, ch. 24; 1796, ch. 68; and the ordinances of that city.

The law imputes to a purchaser knowledge of all facts, appearing at the time of his purchase upon the paper or record evidence of title, which it was necessary for him to inspect to ascertain its sufficiency.

So the purchaser of a wharf in the city of *Baltimore*, erected under the authority of the acts of 1745, 1783, and 1796, though *bona fide*, is affected with notice of the permission granted to build it, and bound by it.

Where an ordinance was passed, granting permission to build a wharf, which required the written assent of the applicant for such permission, and it appeared that he erected the wharf, the law will presume such written assent, and the grantor, and his subsequent assignees, will be estopped from denying such assent.

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Under the acts of 1783 and 1796, *the Mayor and City Council of Baltimore* may refuse their assent to the erection of a wharf, or may grant it with such conditions, limitations and restrictions, as they may deem most beneficial to the navigation, and use of the port, of that city.

Such a grant upon condition, that its exterior margin shall constitute a public wharf, is valid. Its dedication to the public use, when erected, may be required.

The collection of wharfage upon a public wharf, is a fit subject for State legislation.

The act of 1827, ch. 162, sec. 4, gives *the M. and C. C. of Baltimore*, the right to charge and collect wharfage from public wharves, and where the owner of a lot adjacent to such a wharf, demands and receives the wharfage, the city may recover the amount unlawfully received, and withheld from them, by such owner.

APPEAL from *Baltimore County Court*.

This was an action of *assumpsit*, commenced on the 1st September 1840, for money had and received, by the appellee, for the use of the appellants. The defendant pleaded the general issue.

Before the jury was sworn, the parties agreed, that the action was brought for the purpose of trying the following questions.

1st. Whether the wharf in the city of *Baltimore*, known by the name of *Oliver's* wharf, or any, and if any, what part of it is a public wharf?

2nd. Whether, if it shall be decided, that the said wharf, or any part of it is public, the defendant has acquired any such right to the part so decided to be a public wharf, as to debar the plaintiffs from charging and collecting to their use, such rate of wharfage as they may think reasonable, of and from all vessels, resorting to or lying at, landing, depositing or transporting goods or articles, other than the productions of this State, at or on the part of said wharf, so decided to be public? And for the purpose of fully and fairly trying and deciding the said questions, it is mutually agreed, that the defendant shall admit the receipt of a sufficient sum of money, previous to the institution of this action, as wharfage, to which the plaintiffs would be entitled, if entitled to recover by the decision of the questions above stated, as will sustain the jurisdiction of the court. It is further agreed, that each party shall

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be entitled, on the trial of the case, to give in evidence all such documents and testimony, as would be proper and competent to use in any other form of action at law, or in equity, that could be instituted and tried, in regard to the just and full decisions of the questions above stated, or either of them. It is also agreed, that printed copies of all acts of Assembly, and ordinances of the city, shall be read in evidence by each party, and that plats, maps, and copies of documents, deemed to be correct by the counsel on each side, shall be admitted in evidence, without incurring the expense of special surveys or authentication, and that all errors in the form of action, and in the pleadings, shall be released by each party.

The plaintiffs to support the issue on their part joined, offered in evidence to the jury, that:

Thomas McEldery of *Baltimore* county, deceased, was seized and possessed in fee of the tracts of land, called "*Cole's Harbor* and *Todd's Range*." That he died so seized and possessed. That on the 29th day of July 1813, *Elizabeth McEldery*, *John McEldery* and *Thomas McEldery*, under authority of an act of Assembly of *Maryland*, passed at November session 1810, chap. 138, duly executed and acknowledged, and recorded an indenture of lease to *Martin F. Mayer*, for all that lot of ground, situate in the city aforesaid, and contained within, &c., beginning for the same on the west side of *Union Dock*, at the distance of 720 feet southerly, from the point or place, where the west side of said dock would be intersected by the south side of *Wilkes street*, if extended; and running thence southerly, bounding on the west side of said dock 425 feet; thence south forty-seven degrees west, still bounding on the water 36 feet; thence north forty-eight degrees west, still bounding on the water 205 feet, 2 inches; thence north three degrees west, still bounding on the water 305 feet; and thence by a straight line to the place of beginning, together with all, &c. To have and to hold the said lot and premises, with the appurtenances, together with the exclusive right of extending, not exceeding one hundred and four feet into the water, any and every part of the said lot, piece or parcel of ground,

which fronts the *Basin*, provided he can obtain permission for that purpose, from the city council of *Baltimore*, or from the legislature of the State of *Maryland*, unto the said *Martin F. Maher*, his, &c., from, &c., for and during, and until the full end and term of ninety-nine years, from thence next ensuing, with the right in the lessors, to distrain, re-enter, &c.

Whereby, they conveyed to *Martin F. Maher*, for the term of ninety-nine years, renewable forever, with the rights and privileges in said lease recited, the premises therein described, being parts of said tracts of land, of which the said *Thomas McEldery* died seized, and possessed as aforesaid. That on the 29th day of the same year, the said *Martin F. Maher*, by indenture, assigned and transferred said demised premises to *Job Smith*.

That on 25th February 1817, *Horatio McEldery* exhibited his petition in the Court of Chancery, praying for the sale of the real estate of *Thomas McEldery*, or of so much thereof as was necessary for the payment of his debts; that upon said petition proceedings were duly had, and on the 14th July 1817, a sale of the interest of *Thomas*, in and to the premises described in the foregoing lease, was duly decreed by the Chancellor of *Maryland*, and *Thomas Phenix* was appointed trustee to make said sale; that the sale thereof, in pursuance of said decree, was made by said trustee to *Robert* and *John Oliver*, to whom a conveyance thereof was made by indenture, bearing date on the 1st April 1818.

That in 1820, *Robert* and *John Oliver*, re-entered upon said demised premises, for the non-payment of the rent accruing under said lease, and by an action of ejectment for the non-payment of rent under the statute of 4th Geo., 2d, instituted in *Baltimore* county court, ejected *Job Smith* from their premises.

The plaintiffs further offered in evidence the following petition, which it was admitted was signed and presented by *Robert* and *John Oliver*, dated October 16th, 1821.

“To the honorable, the *Mayor and City Council of Baltimore*: The petition of *Robert Oliver* and *John Oliver*, sheweth, that they are rightful owners and proprietors of a parcel of ground

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situated on the west side of *Union Dock*, in the city of *Baltimore*, and bounded, in part, by the water of the basin of *Baltimore*, which is shewn on the plot hereto annexed. They further state, that under the conveyance to them of said ground, there was granted the exclusive right of extending, not exceeding one hundred and four feet into the water, any and every part of said parcel of ground which fronts the basin, provided permission for that purpose could be obtained from the corporation of *Baltimore*, or the legislature of this State. They conceive that the grant of such privilege, would not be an infringement of, nor would it interfere with private rights. Wherefore, they pray, that by an ordinance, or resolution of your honors, your petitioners may be permitted to extend their aforesaid ground from its present limits, to the dotted lines shewn on the plot aforesaid, from E to F, and from F to G, and they, as in duty bound, &c.

ROBERT and JOHN OLIVER.

Baltimore, October 6th, 1821.”

And the ordinance thereon passed, approved 10th November 1821, chapter 103, also the following petition likewise: admitted to have been signed by the said *Robert and John Oliver*, dated 8th November 1821.

“To the *Mayor and City Council of Baltimore*. Gentlemen, having examined an ordinance, passed in pursuance of our petition, relative to the extension of our property, binding on, and at the termination of *Hugh street*, deem the conditions too hard, and therefore ask leave to contract the same within the line on the plat from E to G, and request that an ordinance may pass accordingly, all which is respectively prayed for, by gentlemen. Your ob’t. servants,

Signed, ROBERT and JOHN OLIVER.

8th November 1821.”

And the ordinance of 19th November 1821, chapter 101, (which ordinance, with all others,) and the proceedings of the *City Councils* relating to the case, it is agreed, may be read from the printed books and proceedings of the said *Mayor and City Council*, as far as the same may be deemed material by

either plaintiffs or defendant, as if the same had been incorporated with, and made part of this bill of exceptions.

The plaintiffs further proved, by *Jesse Hunt*, that he is register of the city of *Baltimore*, having the care and custody of the papers connected with the proceedings of the City Councils; that he had carefully searched said papers, and that he had not been able to find any papers relating to said ordinances subsequent to the date thereof; that there is no record existing of the proceedings of the commissioners or port wardens, relating thereto; and they proved, by *W. L. Marshall Esq.*, that he had carefully searched the papers of the port wardens' office, without being able to find any documents relating thereto. They then offered in evidence, by *Joseph Owens*, a competent witness, that he was one of the port wardens of the city of *Baltimore*, for the years 1821 and 1822; that he recollects the fact, that the grounds included within the lines of E, F, G, and the other lines embracing the parallelogram, described on the plat accompanying the petition of *Robert and John Oliver*, of the 16th of October 1821, were filled up in pursuance of the ordinance of the 19th of November 1821, by the authorities of the city of *Baltimore*; that they were engaged in said work during the period of about two years, and that the expense of said filling up, was paid by the city of *Baltimore*. They further proved, by said *Owens*, that he was present, in the office of the port wardens' of *Baltimore* in 1821, when the Mayor of the city presented to said port wardens, the letter of *Robert and John Oliver*, signifying their assent to the terms of the ordinance of the 19th of November 1821, and that soon thereafter, the work of filling up said ground was commenced by the city authorities; that said letter he supposed to have been filed, but, that he has no knowledge what has become of it. They further proved, by the said *Owens*, that after the passage of the said last mentioned ordinance, and when he, as port warden, was about to proceed to fill up said ground, he had an interview with *Robert Oliver*, upon private business of the said *Oliver*, in which the improvement of the property referred to, became the subject of conversation,

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when said *Oliver* told witness that he had assented to the terms of said ordinance, although he thought it hard, that he should be required to fill it up with fresh earth to the extent required, over the filling which was to be done by the city. They further offered evidence by *Samuel Boyd*, that he was likewise a port warden in 1821 and 1822; that he knows that the grounds of *Robert* and *John Oliver* were filled up by the city, in pursuance of the ordinance of 19th November 1821, but that he has no recollection of ever having seen a letter or other paper signifying the assent of said *Olivers* to the terms of said ordinance. They likewise offered evidence, by *Walter Frasier*, that he was a laborer in the mud machine belonging to the city of *Baltimore*, in the years 1821 and 1822; that he assisted in filling up the grounds of *Robert* and *John Oliver*, above described, and that *Mr. Oliver* was almost every day present whilst the work was in progress, and gave directions as to the manner in which it was to be done.

It was admitted, that the plat above referred to, and accompanying this bill of exceptions, justly locates and describes the premises purchased by *Robert* and *John Oliver* from *Thomas Phenix*, as before stated.

The plaintiffs further offered in evidence, by *Jesse Hunt*, the register of the city of *Baltimore*, that the city authorities collected wharfage upon the property in controversy, from 1826 to 1831 inclusive; and proved, by *McNeill*, that witness, in conjunction with *Taylor*, rented the wharf in controversy for several years before the year 1831, from *Sprigg*, who was the officer charged by the city authorities with the collection of wharfage and tonnage, and that he paid therefor, \$10 per month; that by virtue of this renting, witness collected wharfage and otherwise used said property, without molestation or interruption from *Mr. Oliver* until 1831, when he was told by *Mr. Oliver* that he was entitled to said wharf, and desired witness to acknowledge himself the tenant of one *Boyer*, who held under *Oliver*, and that upon witness declining so to do, *Oliver* cut loose the scow of witness from said wharf, after which, witness rented from *Boyer*, and continued so to do till he gave up possession of the wharf.

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The plaintiffs further offered in evidence, that *John Oliver* is dead; that *Robert Oliver* thereupon became entitled to his interest in said property; that *Robert Oliver* is dead, and that the defendant purchased said property from his representatives, duly authorised to sell the same, and now holds under said purchase. It was admitted, that the defendant has in hand \$100, received by him as wharfage upon said property.

The plaintiffs further proved, by *George M. Gill, Esq.*, that the space of ground marked on the aforesaid plot, as a street thirty feet wide, *Hugh street*, was laid out as a street in the year 1820, by the commissioners appointed and authorised by law to divide the real estate of the said *Thomas McEldery* among his heirs, and that he, the said *Gill*, had become possessed of a portion of the lots fronting on said street, by intermarriage with one of the heirs of said *McEldery*, and had leased and sold said lots as binding upon said street; and had always considered said street as a public street, or highway, made such in virtue of said division, and had so particularly explained to those who leased or purchased said lots from him.

The defendant proved, by said *Gill*, and by others, that the ground, thus marked, had not been paved or lighted, or otherwise reduced under the police regulations, but has always been very much blocked up by lumber and other obstructions of various kinds; and that the occupiers of the lots binding upon it had, from the filling up of the said ground to the division of the said *McEldery's* estate above referred to, collected wharfage upon the portions of said street in front of their respective lots, and that since the said division, they have continued to do so.

The defendant also offered in evidence, that *Hugh's street* had never been condemned, or opened as a public street or highway; and also proved, by *John Dukehart*, that he was a city commissioner the same years as *Joseph Owens*, and had never seen, or heard of a letter from *Robert* and *John Oliver*, or either of them, in reference to the acceptance of said ordinance.

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The defendant also proved, by one *Fenby*, that the parallelogram E, F, G, had not been kept in repair at the public expense, but that he was obliged, by the city, to pay the usual hire of the mud machine of the city for repairing the same. The said *Fenby* being, at the time said repairs were made, and hire claimed, the tenant under *Robert Oliver*, claiming as has been heretofore set out.

The defendants further gave in evidence the patent for the said property, and prayed the court to instruct the jury as follows :

1st. That if they find, from the evidence, that *McEldery*, the elder, was originally the owner of that part of the tract of land called *Cole's Harbor*, which was bounded by the waters of the basin, and being such owner, made by authority of law, all the ground upon the plat which is in evidence, which lies immediately contiguous to such part of said tract, and in front thereof, including that portion of said ground which was leased afterwards by said *McEldery* to *Martin F. Maher*, that then said *McEldery* was the owner, in fee simple, of all of said ground so made as aforesaid.

2nd. If the jury find the facts stated in the first prayer, and also find, that after said portion of said ground was leased to *Martin F. Maher*, and before the year 1821, *Robert* and *John Oliver* became, by due course of law, by title derived from said *McEldery*, the owners in fee of said portion of said ground, and that being such owners, they, by the permission of the *Mayor and City Council of Baltimore*, or their duly constituted agents for this purpose, extended the said portion of said ground further into the basin, as the same appears on the plats, that then the said *Olivers*, by virtue of said facts, became, as soon as said further improvement was made, owners in fee of the same.

3rd. If the jury find the facts stated in the two first prayers, and shall also find, that in the division which was made of that part of said ground on the plats, which was made as aforesaid, by said *McEldery*, amongst his heirs, and for the purpose of that division, the streets located on said plats, were laid out,

and called for in the said division, and in the conveyances made in pursuance thereof; and shall also find, that said streets, or the ground on which they are located, have in no other way been disposed of by the heirs or assigns of said *McEldery*, or condemned, or appropriated to the use of the plaintiffs; and if they shall further find, that such streets have never been actually opened or used by the public, but on the contrary, and especially, the one called in the evidence *Hugh's street*, have been always, from the time they were laid out as aforesaid, totally obstructed by the proprietors of the lots, bounding on the same, by fences or otherwise, so as to render a passage over the same impracticable; that the plaintiffs have no title in the said streets, or the ground covered by them, and cannot, because of any such title in said *Hugh's street*, derive any title to that portion of the said wharf improvement, made by the *Messrs. Olivers*, which is in controversy in this action.

4th. If the jury find the facts stated in the three preceding prayers, then the plaintiffs have failed to prove title in that part of said wharf which is in controversy in this suit, and are not entitled to recover.

The plaintiffs prayed the court to instruct the jury as follows:

That if they shall believe the facts set forth in the several prayers, submitted on the part of the defendant, and shall further find from the evidence in the cause, that the petition, dated 6th October 1821, and signed *Robert and John Oliver*, was so signed by said *Olivers*, on the day of the date thereof, and that afterwards, and before the passage of the ordinance, of the extra session of 1821, (and approved 9th November 1821,) the said petition was presented to the *Mayor and City Council of Baltimore*; and that afterwards, and on the basis of said petition, the said ordinance was passed, and made, and approved, and that the said *Robert Oliver*, and said *John Oliver*, had notice of the passage of said ordinance, and of all its terms, provisions and conditions; and shall further find, that after the passage of said ordinance, and after notice of the terms, provisions and conditions thereof, the said *Robert Oliver* and *John Oliver*, signed the other petition, and dated 8th November 1821, and

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presented the same, so signed by them, to the *Mayor and City Council of Baltimore*; and shall further find, that after the receipt of said last mentioned petition, and on the basis thereof, the *Mayor and City Council of Baltimore*, passed the ordinance which has been given in evidence, and approved 10th Nov. 1821, and that the said *Robt. Oliver* and *Jno. Oliver* had notice thereof, and assented to the terms, provisions and conditions thereof, and of the said preceding ordinance, as modified or altered by said last mentioned ordinance; and shall also further find, that the ordinance, approved 19th Nov. 1841, was passed and made by the *Mayor and City Council of Baltimore*, and that said *Robert Oliver* and *John Oliver* had notice thereof, and of the terms, conditions and provisions of said ordinance, and assented to the same; and that afterwards, said *Robert Oliver* and said *John Oliver* made and constructed the extension of ground into the *basin*, in the manner and to the extent given in evidence in this cause, and that the said extension was made under the authority, and under the terms, conditions and provisions of said ordinances; and shall further find from the evidence in the cause, that sand was supplied and delivered agreeably to the terms and provisions of the said last mentioned ordinance, and that the sand was so accepted and received by the said *John Oliver* and *Robert Oliver*, or by their agents, with their knowledge and acquiescence; and shall further find, that after said extension was made and completed, the city authorities, with the knowledge and acquiescence of the said *Robert Oliver* and *John Oliver*, took possession of the wharf, (now claimed by the plaintiffs as a public wharf,) under the authority, and by force of the terms, conditions and provisions of said several ordinances, and so continued in possession thereof, from 1825 to 1831, without any claim on the part of said *Robert Oliver* and *John Oliver*, or either of them, and without any question or denial of the title of the said plaintiffs, to hold and possess the same as a public wharf, that then the plaintiffs, under and by virtue of said ordinances, and of the facts hereinbefore stated, became, and were entitled, by contract, to the use and possession of said wharf, as a public

wharf of the city of *Baltimore*, and that as against said *Robert* and *John Oliver*, the said plaintiffs, under and by virtue of its provisions, was lawfully entitled to claim and hold the same as a public wharf. If the jury shall find the facts stated in the foregoing prayer, and that the defendant derived title to the property, connected with the matter in controversy, under the heirs of *Robert* and *John Oliver*, and is in possession, and claiming the title thereto, under said *Olivers*; and shall further find, that said defendant has received from tenants, and others in possession of said wharves, \$100 and upwards as wharfage, that then the plaintiffs are entitled to recover such sum so in the hands of the defendant.

And the court, (ARCHER, C. J., and MAGRUDER, A. J.,) granted the first and third prayers of the defendant so as aforesaid offered, and rejected the second and fourth prayers, substituting in lieu of said second and fourth prayers the instruction following:

If the jury find from the evidence, that *Martin F. Maher* never improved the grounds included in his lease, nor applied for leave to do so, and that *Robert* and *John Oliver*, in the year 1820, obtained a judgment in ejectment, as the grantee of the fee from the *McElderys*, and the jury should believe, that the *McElderys* were owners, in fee, of the lots fronting on the said improvement, and designated on the plot as line marked 104 feet, that then the plaintiffs cannot recover, because the lease to *Maher*, was merged by said recovery, by *Oliver*, as grantee of the fee, and that the covenant made to *Maher* by *McEldery*, in relation to said improvement, became thereby inoperative, and passed no rights to *Robert* and *John Oliver*; and that if the jury find the facts offered in evidence in the cause to be true, *McEldery's* heirs were the owners of the fee on said lots, fronting on the water as above designated.

The court also rejected the prayers offered by the plaintiffs, to which instruction, so given by the court, and each of them, and to their refusal to give the instructions prayed for by the plaintiffs, and each of them, the plaintiffs excepted, &c.

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The verdict and judgment being against the plaintiffs, they prosecuted this appeal.

The cause was argued before DORSEY, CHAMBERS and MARTIN, J.

By PRESTMAN, NELSON and McMAHON for the appellants, and

By GLENN and REVERDY JOHNSON for the appellee.

DORSEY, J., delivered the opinion of this court.

In bar of the appellant's right to recover, in the action they have instituted, a great variety of objections have been interposed.

First, it is insisted, that the right to make the improvement in question, and the improvement when made, remain in the heirs of *Thomas McEldery*; and that, therefore, the agreement of the *Olivers*, in regard to the public wharf, was wholly inoperative and void. This objection, we think, cannot be sustained. By the deed for the reversion to *Robert and John Oliver*, all the right, title, and interest of the heirs of *McEldery*, as well in the water lots demised to *Martin F. Maher*, as in the extension or improvement thereon, which the lessee was authorised to make, passed to said *Olivers*, who, by virtue of said conveyance, and their recovery in ejectment against the lessee, and those claiming under him, under the statute of 4 *George 2*, became seized, in fee, of all the right, title, and interest in the property held by the heirs of *McEldery*, prior to the lease to *Maher*; and, upon the forfeiture, or termination of the lease, no right or interest in the original lot demised, or the improvement or extension authorised to be made by the lessee, could revert to them. To sustain the argument, urged by the appellee, that no entry or distress could have been made by the lessors or their assigns, had the improvement been made by *Maher*, the lessee, no authority has been adduced, nor do we think any can be found; nor can we conceive a reason why, if the improvement had been the work of the lessee, the right of entry, or distress, by the lessors or their

assigns, upon the improvement, was not as indisputable, as it was upon the original water lot itself.

The next objection, relied on by the appellee, is, that to give validity to the creation of this public wharf, in the mode in which it has been attempted, would be in violation of the registration system of our State, in regard to interests in lands, and in direct opposition to the decision of this court, in the case of *Hayes and Richardson*, 1 *Gill & John*. 366. This objection cannot be maintained. To give efficiency to the arrangement, by which this public wharf has been provided for, is in perfect accordance with the doctrines established in the case of *Hayes and Richardson*, and with the general registry system of the State. It sanctions no conveyance, or incumbrance, created by matters in *pais*, or resting in parol; the means by which the wharf has been erected and appropriated to the public use form a part of the paper title, the record evidence, which must be resorted to and examined, to trace the title to the property in question. No patent for this improvement has issued, or will issue from the land office of the State. No title to it can be shewn, but by a reference to the acts of 1745, ch. 9, sec. 10; of 1783, ch. 24, sec. 9; of 1796, ch. 68, sec. 10; and the ordinances of the city of *Baltimore*, of November the 10th and 19th, of 1821; and these disclose every thing in relation to the wharf, as fully as if its construction and use had been provided for in a patent from the land office, or by deed duly executed, acknowledged, and recorded amongst the land records of *Baltimore* county.

The next objection, raised to the appellants recovery, is, that the appellee is a *bona fide* purchaser, without notice, and, therefore, even though the *Olivers* were bound by the arrangement as to the public wharf, yet, that it has no obligation as to him. For this objection, there is not the slightest foundation; the law imputing to a purchaser a knowledge of all facts, appearing, at the time of his purchase, upon the paper or record evidence of title, which it was necessary for him to inspect, to ascertain its sufficiency.

Another of the objections of the appellee is, that it would be a fraud upon him, to presume the writing by the *Olivers* of the letter assenting to the terms of the city ordinances, as required by the ordinance of the 19th of November 1821. If presuming the writing of such a letter would be a fraud upon the appellee, it would be equally a fraud upon the *Olivers*. Can such a presumption as against them, be termed a fraud? Nay, would it not rather be regarded as a fraud on their part, after exercising rights and acquiring property which only could have resulted from such a letter, to deny that they had written it? They are both at law and in equity estopped from doing so; and the estoppel applies with equal force against the appellee claiming under them.

The act of 1745, ch. 9, sec. 10, enacts, that "all improvements, of what kind soever, either wharves, houses, or other buildings, that have, or shall be made out of the water, or where it usually flows, shall (as an encouragement to such improvers,) be forever deemed the right, title, and inheritance of such improvers, their heirs, and assigns forever." To prevent the evil consequences likely to flow from this latitudinarian enactment, a prominent object of the act of 1783, ch. 24, in appointing "wardens for the port of *Baltimore*," was to protect, as concerns its navigation, the interests of its citizens, and the public at large; as a means of enabling the port wardens to do this, by the 9th section of this act it is enacted, "that no person, or persons, shall make, alter, or extend a wharf or wharves, from and after the publication hereof, without laying before the said wardens a plan of his or their intended wharf or wharves, and without consent first obtained, under the seal of the board, to carry the same into effect." Under this act it appears to be conceded in the argument, (as well it might be,) that the port wardens were competent to have authorised the extension or improvement asked for by the *Olivers*, upon condition, that it be constructed of particular materials; that it be abutted by a wall of stone, instead of wood, and that it be of a specified height, prescribed by the wardens of the port of *Baltimore*, or the successors to their powers, the

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Mayor and City Council of Baltimore. It is equally clear, that the *Mayor and City Council of Baltimore* might have refused their assent to the wharf extension, in the plan proposed, or have required that a dock should be left in the middle of the extension, for the mooring of vessels, or that rings or posts be attached to the wharf, so that vessels might make fast, or moor to it, whether lying out in the basin or by the side of the wharf. If the safe and convenient navigation of the port of *Baltimore*, by the public, made such requisitions necessary, (of which necessity, the *Mayor and City Council* were the judges,) they were warranted in exacting them.

Of the great advantage and convenience resulting to the interests of navigation, by the public wharf in question, nobody can doubt. And, as the case is now before us, we are bound to presume that the extension, as proposed by the *Olivers*, could not, in the judgment of the city authorities, have been granted, without detriment to navigation, unless the injuries resulting from it, were counteracted by the great facilities afforded to navigation by the surrender to its uses, of the exterior margin of the improvement in the shape of a public wharf. If the city authorities believed that the unconditional grant of the power of improvement, proposed by the *Olivers*, would be ruinous to the navigation of the port of *Baltimore*; but, that its effects would be wholly obviated by the facilities to navigation afforded by the wharf at the southern side of the improvement, being dedicated to the use of the navigating public, were they not authorised, nay, were they not bound to withhold their assent, unless such a dedication were made? or suppose the *Olivers'* original application had, thus proffered the dedication, ought the corporate authorities, entertaining such opinions, to have withheld their assent? We think not.

This case is not at all changed by the fact, that the privilege sued for by the *Olivers* was not granted, but upon superadded terms and conditions imposed by the corporation. Their action upon this subject must receive the same interpretation as if the terms, ultimately agreed on, had been the first, and only

plan and proposition of the *Olivers*, and as such, had been unconditionally assented to. Nor is the case varied by the fact, that the board of wardens of the port of *Baltimore*, had been abolished, and their powers vested in the corporate authorities of the city. What has been done, must receive the determination that would be given to it, had the original plan or application from the *Olivers*, been to the wardens; and been that ultimately established by the city ordinances, and so unqualifiedly assented to by the board of wardens.

We do not concur with the counsel of the appellee, who regard this case as identical in principle, with the case of the Mayor, Aldermen and commonalty of the city of *New York*, against *Scott*, decided by the Supreme Court of *New York*, and reported in 1 *Caines*, 543. In the latter case, the act of the legislature required the owners of lots to fill them up, and make piers according to the directions of the corporation. On non-compliance, the corporation were to be at liberty so to do, and to receive the wharfage to their own use. The corporation passed an ordinance requiring the owners of lots, within a time specified to fill them up and make the piers, (which was accordingly done,) and reserving a portion of the wharfage on the piers, and declaring the piers, public streets, or highways, to be kept in repair by the said owners, their heirs and assigns. For such a reservation and declaration, not a semblance of authority was shewn; and the court decided, that such a reservation was void, being wholly unauthorised by the act of the legislature, and it is difficult to imagine, how a doubt could have arisen in such a case.

In the case before us, the ordinances of the corporation do not, peremptorily, legislate away the water rights of the *Olivers*, without color of authority, and in manifest contravention of the act of the legislature, under which the ordinances were passed, as was done to the lot owners, by the Mayor, Aldermen, and commonalty of the city of *New York*, in the case reported in 1 *Caines*; but simply refuse an unconditional assent (which as a faithful statutory guardian of the navigation of the port of *Baltimore*, the corporation was bound to with-

hold,) to an improvement that could only be made, consistently with the paramount interests of navigation, upon the terms prescribed by the ordinances. They, the *Olivers*, were deprived of no right which they possessed; they were imperatively enjoined to do nothing; their actions were the result of their own discretion. They were offered powers of great value and importance, limited by no restriction, but that necessarily imposed by a just regard to the rights and interests of the public. The acceptance or rejection of them rested entirely with themselves.

If the conditional assent, given by the corporation of *Baltimore*, to the improvement, had, without reference to navigation, or the protection of the facilities thereof, secured to the corporation for its own benefit, a portion of the improvement, or of the wharfage arising therefrom, then would the condition, as such, be wholly inoperative and void. But such was not the conduct of the *Mayor and City Council of Baltimore*. They reserved nothing for the separate benefit of the corporation; but, as the protectors and guardians of navigation, stipulated exclusively for its preservation in securing to it, in exchange for the facilities surrendered, the equally important facilities to navigation resulting from the creation of the public wharf in question. We think, therefore, that the requisition, or condition, (or contract, if it may be so called,) under which the *Olivers* improvement was made, was, on the part of the *Mayor and City Council of Baltimore*, a legitimate exercise of the powers conferred on them, by the laws of the State, for the protection of the navigation of the port of *Baltimore*.

Assuming the wharf in question to be a public wharf, the collection of wharfage upon it formed a fit subject for State legislation; and the 4th section of the act of 1827, ch. 162, gives to the *Mayor and City Council of Baltimore*, the right to charge and collect the wharfage for which their action was instituted, and which is unlawfully withheld from them by the appellee, who has received it.

We concur with the county court in granting the defendant's third prayer, but dissent from their rejection of the

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plaintiffs' prayers, and from the granting of the defendant's first prayer, and from the instruction given by the court to the jury, and therefore reverse its judgment.

JUDGMENT REVERSED AND PROCEDENDO ISSUED.

CHAMBERS J., dissented.

NICHOLAS PHELAN AND ROBERT BOGUE *vs.* JOS. CROSBY.—
June 1845.

The plaintiff proved, that on the 3rd March 1841, he sold and delivered to the defendant a quantity of merchandize, to the value of \$494.25, and there rested his cause. The defendant offered in evidence a bill of parcels, for the same merchandize, of the same date and amount, at six months, due 3-6 September 1841, on which was written by the plaintiffs: "Received payment for above as follows, *R*'s note, dated 16th December 1840, a 5 ms., due 16th May for \$484.79. Interest on amount of note from 16th May to 3rd September, \$8.55. Cash for balance, \$0.91." The plaintiff produced the note in court, and offered to deliver it up; and proved, that on the 4th May *R.* applied for a release under the insolvent laws. The note was in blank, and the defendant, at the time he passed it to plaintiff, refused to endorse it. There was evidence given, without exception, that the plaintiffs, after inquiry about *R.*, at the request of the defendant, agreed to take the note at their own risk; that the defendant knew, before the time of his purchase, that *R.* did not pay his notes at maturity, and also evidence from which the jury might infer fraud on the part of the defendant. **HELD:**

- 1st. Under the act of 1825, ch. 117, this court only reviews the questions decided by the county court, so that, where evidence is given without exception, the parties cannot object to its admissibility in this court.
- 2nd. That the receipt was evidence of payment, and the plaintiffs, upon the surrender of the note of *R.*, were not necessarily entitled to a verdict.
- 3rd. That the knowledge by the defendant, when he passed the note, that its maker was in a failing condition, did not, under the circumstances of the case, make the passing of the note a fraud upon the plaintiffs.
- 4th. That there was no evidence that the defendant concealed the information he had, in relation to *R.*, from the plaintiffs, at the time of passing away the note.
- 5th. That if the note of *R.* was received by the plaintiffs in payment, without recourse to the defendant, in the event of its being dishonored, then he is not entitled to recover, unless the jury shall find the transfer to have been fraudulently made.

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6th. That if the sale was made upon a credit, not expired when the action was brought, then the plaintiffs are not entitled to recover in *assumpsit*, although the note was received but as collateral security, and not in payment.

A judgment at law reversed, without prejudice.

APPEAL from *Baltimore County Court*.

This was an action of *assumpsit*, brought on the 3rd June 1841, by the appellants against the appellee. They declared upon the common counts, to which the defendant pleaded the general issue.

The plaintiffs, to support the issue on their part joined, offered in evidence to the jury, that on the 3rd day of March 1841, they had sold and delivered to the defendant, a quantity of segars, to the amount of \$494.25. The defendant thereupon offered in evidence the following bill and receipt :

“*Baltimore*, March 3rd, 1841.

Mr. J. Crosby bought of *Phelan & Bogue*,

3000 Segars in bundles,	a	\$10,	-	-	\$ 30 00
23½ <i>M</i> do. in flat boxes	a	10,	-	-	232 50
25½ <i>M</i> do. do.	a	9,	-	-	231 75
Six months, due Sept. 3-6.					<hr/> \$494 25

Received payment for above, as follows :

R. Moore's note, date Dec. 16, '40,

five ms. due May 16, for - - \$484 79

Interest on am't of note, from May

16th to September 3, - - 8 55

Cash for balance, - - - 91

\$494 25

“*Phelan & Bogue.*”

And proved the signature to the said receipt to be in the hand writing of the plaintiffs.

Whereupon the plaintiffs produced in court, and offered to deliver up to the defendant, the note of *R. Moore*, mentioned in said bill and receipt ; and proved, that the said *Moore*, on the 4th day of May 1841, applied for the benefit of the insolvent laws.

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The defendant then offered in evidence by *Mr. Lanahan*, a competent witness, that in the spring of 1841, he had a conversation with *Phelan*, one of the plaintiffs, in which *Phelan* stated to witness, that he and *Bogue* had sued, or were about to sue the defendant; that defendant had swindled them. That witness then inquired of him, whether in the sale of the segars referred to, they had not agreed to take *Moore's* note at their own risk? That *Phelan* replied they had, and that the defendant had refused to endorse said note, (which it was admitted, at the time it was passed to plaintiffs was in blank, and in favor of no particular payee,) and requested the plaintiffs before receiving it, to inquire into the credit and condition of the said *Moore*; that said plaintiff had, accordingly, made inquiry of *R. Lemmon & Co.*, and *F. Boyle*, and that upon their representation of *Moore's* solvency, had traded the segars for the note.

The plaintiffs thereupon offered in evidence, that the defendant, in the fall of 1840, and winter of 1841, held several notes of said *Moore*, one of which, for \$733, fell due on the 17th January 1841, and was unpaid at maturity. That another, for \$473, fell due on the 18th February 1841, and was also unpaid at maturity. That the defendant, after said notes were due and unpaid, applied to said *Moore* to renew said notes in divided sums, making four notes, all of which were drawn in blank. That at the time they were signed, said *Moore* stated to the defendant, that he could not pay them at maturity; that defendant replied, that made no difference, he wanted to get them discounted at bank, and that if he, *Moore*, was not able to pay them when they fell due, that the defendant would pay or assist *Moore* to pay them. The witness stated, that the note hereinbefore mentioned, was not one of said four renewed notes. Said renewed notes having been given for the debt of another, for whom *Moore* was an endorser, whereas the note in question, was given by *Moore* for a debt contracted by himself with the defendant. The plaintiffs further offered in evidence by *John P. Adams*, a competent witness, that sometime in the winter of 1841, the defendant

offered the note in question, in blank, to witness in exchange for segars. That witness, in conformity with a suggestion from the defendant, who refused to endorse said note, made inquiries in regard to the drawer, which proving unsatisfactory, he declined the arrangement proposed by, and returned the note to the said defendant. They also proved by *Mr. Plowman*, a competent witness, that about the same time, in 1841, he was applied to by the defendant, who stated his wish to trade said note for sugar, with *M. Bathurst & Son*, and requested said *Plowman* to negotiate said arrangement for him, that *Plowman* declined to do so, unless the defendant would endorse the note, which he refused to do. That defendant then applied to witness to know, what he would take to guarantee said note? Witness declined to make such arrangement, and inquired of defendant, why he would not endorse the note himself? who replied, that he did not like to put his name on the back of the note of *Moore*, who had already suffered others held by him, to lay over.

Whereupon the plaintiffs offered the following prayers:

1. That the receipt given in evidence in this cause, is no evidence of payment, and that it is no bar to the plaintiffs' recovery, on their surrendering up to defendant the note of *Moore*, mentioned in said receipt.

2. If the jury believe, that the defendant, when he gave the note of *Moore* to plaintiffs, knew that the maker of such note was in a failing condition; that passing it off to plaintiffs, was a fraud upon them, and is no bar to their suit in this case.

3. If the jury believe, that when *Moore* gave the note aforesaid to defendant, he stated to him his inability to pay them at maturity; and that *Crosby* said to *Moore*, he did not expect him to pay them, but he wanted them to get discounted, and would pay them himself, or help said *Moore* to pay them, at maturity; and if the jury further find, that *Crosby* knew said *Moore's* notes were laying over and had been protested, and prevailed on *Moore*, in the close of February or beginning of March, to give him the note now in question, dating it in December previous; and that defendant, when he passed said

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note to plaintiffs, concealed this information from plaintiffs, then this note is no bar to plaintiffs' recovery, if such note proved to be of no value, and the same is now tendered to be delivered to the defendant.

And the defendant offered the following prayers:

1. If the jury find from the evidence, the sale and delivery of the goods, for which this suit is brought by the plaintiffs, to have been made to the defendant on the 3rd day of March 1841, for the sum of \$494.25; and shall also find, that the note of *Robert Moore*, produced in evidence, was received by said plaintiffs from said defendant, in payment of said sum, and without the right of recourse to said defendant, by said plaintiffs, in the event of said notes being dishonored, and not paid, that then the plaintiffs are not entitled to recover in this suit, unless the jury shall find the transfer of said note, by the defendant to the plaintiffs, to have been fraudulently made.

2. If the jury find from the evidence, the sale and delivery stated in the preceding prayer, and that the same was made upon a credit of six months, from the 3rd of March 1841, that then the plaintiffs are not entitled to recover in this suit, although the jury shall believe, that the note of *Robert Moore*, mentioned in said first prayer, was received by said plaintiffs but as collateral security, and not in payment for said goods, said credit not having expired when this suit was instituted.

All of which, with the exception of the first and second prayers, offered on the part of the defendant, the court, (MAGRUDER and PURVIANCE, A. J.,) refused.

To which refusal to grant the plaintiffs' prayers, and to the granting of the defendant's prayers, and each of them, the plaintiffs excepted.

The verdict and judgment being against the plaintiffs, they prosecuted the present appeal.

The cause was argued before DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By GLENN and REVERDY JOHNSON for the appellants, and
By NELSON for the appellees.

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MAGRUDER, J., delivered the following dissenting opinion upon the 2nd prayer of the defendant.

The plaintiffs in error, brought this action in *Baltimore* county court, for goods sold and delivered, and the proof in support of their claim, as set forth in the bill of exceptions, was, that “on the 3rd March 1840, they sold and delivered to the defendant, a quantity of segars, to the amount of \$494.25.” This is the sum which they claimed, and upon this proof, they rested their claim.

The defendant, in order to resist this claim, and to prevent a recovery by the plaintiff, offered in proof, a bill of parcels, dated on the same day, charging the defendant with “segars,” at 6 mo., due Sept. 3rd–6th, \$494.25.

At the foot of this bill, it is stated. “Received payment for above as follows :

R. Moore's note, dated 16 Dec'r. 1840, 3 months

due May 16, for	-	-	-	-	-	\$484	79
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Interest on amount of note, from May 16, to Sep-

tember 3,	-	-	-	-	-	8	55
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Cash for balance	-	-	-	-	-	91	
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\$494 25”

And then follows the signature of the plaintiffs in error.

This paper, offered by the defendant, he contended, proved,

1st. That the claim of the plaintiffs against the defendant, for the segars, was satisfied by the acceptance of the note: and

2ndly. It was insisted, that the claim, (if not satisfied,) was not due until September 6th, and that the action was prematurely brought.

Whether upon either of these grounds the defendant was entitled to a verdict, we are required to decide.

One ground of defence to the action then is, that unless he was guilty of an alleged fraud, the defendant has been paid for the segars, and no recovery could be had, although the institution of this suit had been delayed until the credit expired. This defence is grounded upon the paper, which was offered in evidence by the defendant, (the bill and statement which

follows it,) and this paper, it is said, is to be taken in connection with, and its meaning may be ascertained by the parol evidence, which the defendant adduced.

It is true, that a mere receipt, (not under seal,) is but *prima facie* evidence, that the sum of money mentioned in it, was paid, and of course, oral evidence is admissible to contradict it, to prove what sum was paid, and when paid. Abundance of authority to this effect, may be found collected in *2nd Saunders, on Pleading and Evidence*, 308, 309, (1st Am. Edit.) When, however, an attempt is made by oral proof, to contradict the receipt, it is usually made, not by the party who offers it in evidence, but by his adversary. By what evidence the claim was established in this case, the bill of exceptions does not inform us, but at no period of the trial, could this paper have been admitted, if offered by the plaintiffs. It was introduced into the cause by the defendant, and shall he, who offers the written testimony, be permitted, by parol proof, to falsify it? To insist that its meaning ought to be disregarded, if its meaning, when collected from its words, is not corroborated by the oral proof?

The general rule is, that parol proof is not admissible to alter or vary, (to falsify) the written paper, and this rule is to be observed, even when the parol testimony is offered by the adverse party, except in cases of latent ambiguity, fraud, mistake, or surprise. Hence, the rejection of parol testimony, in the case of *Kemmil vs. Wilson*, 4 *Washington's C. C. R.*, 308, and in *Batters vs. Sellers and Patterson*, 6 *H. & J.* 247, and in other cases, many of which are to be met with in the report of the latter case. See also *1st Phil. on Ev.* 410, a receipt not under seal, is an exception to the rule; but a paper, one object of which is to furnish an acknowledgment of the receipt of money, may contain other matter, which cannot be varied, or contradicted by oral proof. In the case of *Batters*, just mentioned, if, at the bottom of the bill of parcels, there had been a receipt in full, signed by the other party, and in an action by the latter party, to recover the prices of the broad cloths, the defendant had offered in evidence that receipt, no

doubt, oral proof would have been admissible, to explain or vary it, but the receipt at the bottom, would not have authorized the defendant to offer the parol testimony, which the report of the case tells us, was rejected by the court.

We are told in *Phillips* 443, 444, of cases, in which oral proof of independent facts, collateral to the written instrument, may be admitted, but that doctrine has no application to this case.

It is undisputed, in this case, that almost every thing which was received by the plaintiffs, for their segars, consisted of a note of hand, of a third person, and that note, (the names of the parties, the sum for which it was given, the date, time of payment, and every thing said about the note,) is accurately described in the receipt, yet the parol proof was offered, to contradict the written paper, if the words of the written paper, do not mean precisely what the defendant wishes them to mean. I entertain the opinion, that, without introducing another exception to the general rule, which declares parol testimony to be inadmissible, to vary, or contradict a written instrument, this parol testimony, (offered by the defendant too,) must be entirely disregarded in deciding the question, whether the transfer by the defendant, and acceptance by the plaintiff, of the promissory note, mentioned in the receipt, was an extinguishment of so much of the plaintiffs' claim, for the segars, or only entitled the defendant to a credit on account thereof, when the money was received from the maker of it? The case of *Kellogg vs. Richards*, 14th Wendell 116, seems to sustain this opinion.

If indeed, in a case like this now before us, parol proof is admitted to contradict the written instrument, with what propriety could the Court of Appeals, in the case, 2 G. & J. 494, undertake to say, what the meaning of the paper was, and to collect that meaning from its words? Surely the absence of parol testimony, expressly contradicting it, could not have taken the meaning of the contract from the jury, if (in case there was any such testimony,) the verdict of the jury was to be influenced by it. The case went back to be tried again,

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and it was sent back, with this opinion of the court; yet if the party who had been unsuccessful in the Court of Appeals, had been so fortunate upon the second trial, as to prove by a witness, something about the meaning of the parties to that paper; some acknowledgment by his adversary, which might be understood by the jury to mean, that the plaintiff did not understand the contract, as the Court of Appeals understood it, would such parol testimony have authorized the second jury, to interpret the contract, otherwise than as it had been interpreted by the court of *dernier resort*?

But it is said, that the parol testimony was admitted, without objection. True, but this cannot alter the law of the case. For what purpose it was introduced, does not appear; but its introduction into the case, even by consent, could not authorise us to learn from it the meaning of the instrument, if the law requires, that its meaning be collected from its words. Parol testimony, introduced without opposition, that the testator declared it to be his meaning, to devise a fee, could not be admitted to change the meaning of the will, when interpreted by its words, and thus make a fee of an estate for life.

The question then, according to my view of the case, is: What was the contract between those parties, in relation to this note? Was the note received by the parties, as collateral security, or in satisfaction, as an extinguishment of the claim of the plaintiffs, for the segars? and the answer to this question, must be found in the written paper.

In the case of *Glenn vs. Smith*, 2 G. & J. 494, it was decided by this court, that to give the acceptance of a note, the effect of an absolute payment, or extinguishment of a debt, a contract that it should be so, must be shown, and that this was not sufficiently done by the receipt in that case. The receipt said, that the promissory note had been received, "in payment of the above account." Is the paper, the legal effect of which is now to be ascertained, like that, in the case last mentioned? Was its operation only to suspend the plaintiffs' right of action, until the note of *Moore* became due?

Now, it is going very far to say, that a man has not been paid for his goods, when he, who alone is interested in a denial of the payment, acknowledges that something which he has received, was received by him *in payment*. This however, is *res adjudicata*. In the case before us, the plaintiffs say something more. They give the credits, to which the defendant is entitled, as well as the price of the article which they sold to him, and after crediting the amount of the note, and the interest upon it, it being ascertained that those two credits, still leave a balance due for the segars. The next acknowledgment by the plaintiffs is, that on the self same day, when the note was received by them *as payment*, they received "cash for balance." Surely, when the creditor acknowledges that the balance of his claim has been paid, and paid to him in cash, he ought not to be allowed to say, that the whole debt, with the exception of the balance, (which is admitted to be paid,) is still due. This would be, to deprive a creditor of the privilege of making his own contract with his debtor, and in this case, of exchanging his segars for the promissory note of a third person; and this, by assuming that he did not mean what the words, which are used by himself, to express that meaning, must by him have been understood to mean.

The plaintiffs' cause of action then, is not, in my opinion, to be found in this paper, but in the alleged fraud, which when established, deprives the defendant of a right to set up this paper as evidence, to defeat this claim, established by other testimony; and I now proceed to notice the second ground of defence.

On the part of the plaintiffs, it is contended, that even if this note was taken in satisfaction of the claim, yet they may recover the amount of it, in an action for goods sold and delivered, provided, that the proof which they offered, satisfied the jury, that the defendant acted *mala fide*, having at the time of the transfer of this note, to the plaintiffs, knowledge of the insolvency, or failing circumstances of the maker of the note so transferred, and not communicating that knowledge to the plaintiffs.

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Whether the defendant acted fraudulently in this transaction, was a question to be decided by the jury, and not by the court. The authorities tell us, what if proved to the satisfaction of the jury, would evidence fraud in the vendee. If, (to give an example,) the vendee purchased the goods, with a preconceived design, of not paying for them, then no property passes to him, and the vendor has a right to treat the contract as a nullity, and the vendee, as a person who acquired the possession of them tortiously. 17 *En. Com. L. Rep.* 330. So if the defendant, by fraud, procured the plaintiff to sell his goods to an insolvent, and then got the goods into his possession, in such a case, the plaintiff is not restrained, by any agreement, to give a credit, from suing for the goods, as for goods sold and delivered to him, who is in possession. See *Hill vs. Perrott*, 3 *Taunton* 274, and in 1st *Stephens Nisi Prius* 285, it is said, that an action lies before the credit has expired, if the time given, was after the sale, and not making any part of the original contract, or if the sale, (purchase,) was not *bona fide*.

In deciding this question, the court is required to assume, that the jury might have inferred from the testimony adduced by the plaintiffs, that the conduct of the defendant, was fraudulent; that at the time of the transfer of this note to the plaintiff, it was, if not quite, almost as valueless as a counterfeit bank note; that the circumstances of the maker, were known to the defendant, and not made known by him, to the plaintiff. If the facts be so, what is to prevent the plaintiffs from recovering?

Even in the case, on which the counsel for the defendant principally relies, (*Fergusson vs. Covington*, 14 *Eng. C. L. Rep.* 307, and 17 *E. C. L. R.* 330,) it is conceded, that before the credit expires, the plaintiff may sue and recover in damages, the value of the goods fraudulently obtained, provided his action be *trover*, and not *assumpsit*, for goods sold and delivered. The ground of this decision, so far as the reporter could inform us, was, that the only contract proved by the plaintiff, was a contract or sale on credit. This shows that the cases

are different. The plaintiffs' proof in this case, intimates nothing about a sale on credit. All that is said in regard to a sale upon credit, came from the defendant.

But it is insisted, that in this case, the law will not *imply* a promise, because there was an express promise. If the plaintiffs then choose to sue, before the expiration of the credit, they must abandon the *assumpsit*, and sue for a *tort*. The amount of the argument is, that if there existed at one time between them, what the parties supposed at that time to be a valid contract, although the law pronounces it to be no contract, there is yet an express contract, which will prevent the law from implying a contract. But this cannot be correct. The plaintiffs make out their case, without relying on the alleged contract. They may offer such proof, as was deemed to be sufficient in the case. In *3rd Taunton*, the fraudulent contract is introduced into the case, and relied on by the defendant. So soon as he attempts to establish it, the plaintiffs prove it to be fraudulent, and insist, that they have a right to treat it as a nullity, and do so treat it. If it be a nullity, how can it be regarded as an express contract, and thereby prevent the law from implying, in favor of the plaintiffs, an *assumpsit* to pay the value of the goods? So soon as the fraud, which vitiates that contract, is established, the case is precisely what it would have been, if there had not been furnished any proof, that such a contract ever was contemplated by the parties, and the case made out, will be, that the defendant got possession of the property of the plaintiffs, and in a way which will authorise them, not only to institute an action for a *tort*, but also upon *assumpsit*. Why not in this case, as well as in the case of *Hill vs. Perrott*, 3 *Taunton* 274, say, that the law will imply a contract, to pay for the goods, from the circumstance of their having been the plaintiffs' property, and having come to the defendants possession, *if unaccounted for*? Can the defendant prevent the plaintiffs from suing upon this implied contract, by setting up an agreement, (to give credit,) which he fraudulently obtained? The answer to this, is to be found in the same case in *Taunton*. The defendant "cannot be permitted to account for the pos-

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session, by setting up the fraudulent purchase.” And this, because “no man must take advantage of his own fraud.”

In 15 *Johnson* 475, the court say, that the special contract, as to the manner of payment being void, on account of the fraud, the plaintiff may disregard it, and bring *assumpsit* for goods sold. The fraudulent misrepresentations, made by the defendant, vitiated the whole contract. In 6 *Johnson* 110, it is stated, that the taking of a note, under a fraudulent misrepresentation, was no payment, and any term of credit, which the taking of the note may have implied, became void. So in 15 *Mass. Reports*, p. 81, *Chief Justice Parker*, in delivering the opinion of the court, said: “The credit was obtained upon an offer of adequate security. The security was wholly worthless. The consideration for the credit therefore failed, and the money thus wrongfully obtained, could not *for an instant*, be conscientiously retained. See also 2 *Johns. Rep.* 455, and the remarks of *C. J. Eyre*, in *De Symonds vs. Minwicke*, 1st *Esp.* 430, and those of *Lord Kenyon*, in *Packford vs. Maxwell*, 6 *D. & E.* 52.

It would seem, that according to a case relied on by the defendant, (in 17 *Eng. Ch. Reports*,) the plaintiff had a right to regard this contract, (as to the time of payment,) as a nullity, and to sue before the expiration of the credit, if he sued for a *tort*. If so, what is there in the case, to prevent them from waiving the *tort*, and suing upon an implied *assumpsit*. This is frequently done. See *Stockett against Watkin’s adm.* 2 *G. & J.* 326.

In one of the *English* cases, (4th *East* 147,) in which it was decided, that the plaintiff could not, in that case, (unlike this,) bring an action of *assumpsit*, until the credit expired, although he might sue on the special agreement. *Lord Ellenborough* was reluctant to non-suit the plaintiff, although there was no attempt to prove, that the defendant, in the purchase of the goods, acted *mala fide*. Another judge, (*Le Blanc*,) in his decision, seems to have been influenced by, perhaps, an extravagant fondness for “the forms of action:” “In all cases, *without express authority to the contrary*, it is better

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to keep the forms of action as distinct as possible, instead of running one into another.” This remark may be entitled to some weight, in any case, to which it can, with truth, be applied. But for the form of action adopted in this case, as a substitute for *trover*, (which all admit, might have been instituted by these plaintiffs, and at the time this suit was brought,) it is believed, there will be found “express authority” in the cases, to which reference has been given. In a case like this, and in which the court, in deciding upon this exception, must assume, that all the justice is on the side of the plaintiff, I do not consider myself at liberty to disregard such decisions, pronounced by such learned judges, because of any thing to be found in the cases cited, and relied on by the counsel for the defendant.

My opinion is, that the judgment of the court below, ought to be reversed.

By the other Judges :

JUDGMENT AFFIRMED, WITHOUT PREJUDICE.

JNO. H. HARLAN AND MARGARET HARLAN vs. DAVID BROWN.

JOHN H. HARLAN AND MARGARET HARLAN'S LESSEES, vs.

DAVID BROWN.—(E. S.) June 1845.

Where a will authorized an executor to sell the residue of the testator's real and personal estate within two years from his decease, a sale made within the two years is valid, though the conveyance to the purchaser was not executed until after that period, and parol evidence is admissible to show the time of sale.

The act of 1831, ch. 315, sec. 10, does not relate to sales of real property, made before that statute went into operation.

It is for the court to decide on the admissibility of evidence, but the comparative value, or weight of testimony, is for the consideration of the jury.

The variation of the compass, and the degree of it, are questions of fact, and upon evidence affecting the degree of variation, it is not for the court to say, that the evidence offered by one party, is better than that offered by the other, to guide the jury in determining whether any, or what allowance shall be made for such variation.

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APPEALS from Cecil County Court.

The first appeal was in an action of *trespass, q. c. f.*, brought on the 19th October 1835, by the appellee against the appellants, for a trespass upon a tract of land called "*Dividing*." Upon the motion of both parties, a warrant of re-survey was issued, and the defendants pleaded *non cul.* The jury found a verdict for the plaintiff *David Brown*.

1ST EXCEPTION. At the trial of the cause, the plaintiff offered in evidence a patent for the tract called "*Dividing*," dated 17th May 1695, to *Mathias Van Bibber*, and after other conveyances, the will of *John Dickson*, which contained the following clause:

"*Item*.—It is my will, that the rest and residue of my real and personal property, shall be sold by my executor, and that my real property be sold within two years from my decease, and to be rented or farmed on shares by my executor, until a sale is made of the said real property, and I hereby empower my executor, to make a good and sufficient deed to the purchaser of the said real estate."

This will, dated 23rd January 1830, upon which letters testamentary were granted the 6th May following, appointed *Samuel Rowland* executor.

The plaintiff then proved, that *John Dickson* died seized of that part of "*Dividing*," conveyed to him by *James Miller*, and the deed from *Samuel Rowland* to *Amos Henshaw*, and the plaintiff *Brown*, of the 19th March 1833, reciting a sale by the said executor, in execution of the trust reposed in him on the 25th November 1831, of his testator's part of "*Dividing*," to the said *Henshaw* and *Brown* for said part.

The plaintiff then offered to prove by parol testimony, that the said sale was made by said executor in November 1830, and within two years of the death of *Dickson*, his testator, and that possession of the said land, was given under said sale within that period; and also gave in evidence a deed of partition, between himself and *Henshaw*, dated the 19th March 1833.

The plaintiff also offered evidence to prove, that the alleged trespass is within the lines of the patent of "*Dividing*." And within the lines of the deed from *James Miller* to *John Dickson*; and that the deed from *S. Rowland* to *A. Henshaw*, and the plaintiff, is for the same land as mentioned in the deed from *Miller* to *Dickson*, and that the alleged trespass is upon the land conveyed to the plaintiff, by the deed of partition between *A. Henshaw* and the plaintiff. It was admitted, that the several deeds above mentioned, were executed, acknowledged and recorded according to the formalities required by law to pass real estate, and that the will of *John Dickson* was also duly executed, so as to pass real estate.

The defendant objected to the admission of the said *parol testimony*, in relation to the time of sale made by the said *Rowland*, but the court, (HOPPER and ECCLESTON, A. J.,) permitted it to go to the jury; the defendant excepted.

2ND EXCEPTION. In addition to the matters stated in the first bill of exceptions, the defendant prayed the court to instruct the jury, that the deed offered by the plaintiff, from *Samuel Rowland* to the plaintiff, and *Amos Henshaw*, was no evidence of title in the plaintiff, unless they should further believe, from the testimony, that it was executed within two years from the death of the said *Dickson*, which instruction the court refused to give; the defendant excepted.

3RD EXCEPTION. In addition to the matters stated in the first and second bills of exceptions, the defendant prayed the court to instruct the jury, that the deed offered by the plaintiff, from *Samuel Rowland* to the plaintiff and *Amos Henshaw*, is no evidence of title in the plaintiff, unless they believe, from the testimony, that the sale by the said *Rowland* has been confirmed by the *Orphans* court of *Cecil* county, and notice of the time, place, terms and manner thereof, given according to law, which instruction the court refused to give; the defendant excepted.

The second appeal was taken in an action of ejectment, brought on the 6th March 1836, by the appellants against the appellee, for two other tracts, viz: "*Steel's Resurveyed*,"

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and "*Belle Ville*," and presented the same questions as those presented by the action of trespass, 2 *q. f.*, in relation to "*Dividing*;" and also an additional question as to the right to determine the variation of the compass, and which is fully set forth in the opinion of this court. In the second cause, the verdict and judgment was for the appellee.

Harlan and wife prosecuted both appeals.

The causes were argued before ARCHER, C. J., DORSEY and MARTIN, J.

By GROOME and McLEAN for the appellants, and
By OTHO SCOTT and CONSTABLE for the appellees.

MARTIN, J. delivered the opinion of this court.

The cases of *John H. Harlan* and *Margaret A. Harlan* against *David Brown*, and *John H. Harlan* and *Margaret A. Harlan's lessees*, vs. *David Brown*, were presented together.

The first case is an action of trespass, *quare clausum fregit*, the other an *ejectment*. *John H. Harlan* and wife, were the plaintiffs below in the action of *ejectment*, and the defendants in the action of trespass. At the trial of the trespass case, three exceptions were taken by the defendants to the opinions of the court. Three exceptions precisely similar, were taken by the same parties, as plaintiffs in the action of *ejectment*, and also an additional exception.

We propose to examine these exceptions in the order in which they have been presented.

By the second item of the will of *John Dickson*, it is provided, that the residue of the real and personal estate of the testator, be sold by his executor within two years from his decease. *David Brown* claimed under the deed executed by the executor of *John Dickson*, in conformity with the power conferred on him by the will. It became therefore important for him to prove, that the sale was made within two years from the death of the testator, both, for the purpose of showing, that the authority conferred on the executor, had been properly exercised, and that the sale in question, was not embraced

by the 10th section of the act of Assembly of 1831, chap. 315. And it certainly was competent to the party, to establish by parol evidence, as the legal and appropriate mode, *the time* at which this sale was made. This forms the subject of the *first* exception, and we think the court were right in admitting the evidence.

Testimony having been received to show, that the sale of the property in dispute had been made by *Samuel Rowland* to *David Brown*, within two years from the death of *Dickson*, the court were asked to instruct the jury, that the deed of *Rowland* to *Brown* and *Henshaw*, was no evidence of title, unless they should further find, that it was executed within two years from the death of *Dickson*. This instruction the court refused to grant, and presents the question raised by the *second* exception. We concur with the court below, in the opinion expressed by them in this exception, for the plain reason, that the validity of the deed from the executor to the parties claiming under it, depends not on the time when the deed was executed, but when the sale was made; and evidence had been offered, to establish the *factum* of the sale within the period prescribed by the will. The power of sale conferred on the executor, was, we hold, properly executed by a sale of the property within two years from the death of the testator, although the deed was not executed by him, until after that period had elapsed.

We concur also, with the opinion expressed by the county court in the third exception. There was no law making the validity of the sale by *Samuel Rowland*, as the executor of *Dickson*, depend on its confirmation by the orphans court of *Cecil* county, as supposed by the defendants' prayer. It was not embraced by the act of Assembly 1831, chap. 315, sec. 10, because the sale was made before that statute went into operation.

It follows from the views thus expressed, that in the case of *John H. Harlan* and *Margaret A. Harlan* against *David Brown*, the judgment must be affirmed.

The only remaining question to be examined, is that presented by the *fourth* exception, in the case of *Harlan's lessees* against *David Brown*. It has already been stated, that the three first exceptions in this case, are similar to that raised in the trespass case, between the same parties. We, of course, concur with the county court in the opinions expressed by them, in those exceptions. But we dissent from the instruction given to the jury, as contained in the *fourth* exception.

The question involved, depended entirely on the true location of the second line of the tract of land called "*Dividing*."

This court, as early as the case of *Howland and Cromwell*, 1 H. & J. 118, in affirming the opinion of the general court, decided, "that it is the province of the jury to determine the true location of the lands in controversy, from the evidence adduced by the parties, and that it is for the jury to decide, on the justice and propriety of allowing, or not allowing the variation of the compass, and the rate or rule of such allowance, according to the evidence in the cause." And in *Howard vs. Hughes*, 3 H. & J. 12, the Court of Appeals say: "It is the acknowledged and exclusive province of the jury, to decide on the variation of the compass, and to make such allowance as corresponds with the proof, and will advance justice. The juries, in fixing the variation of the compass, are not confined to any certain rules, but are governed by the circumstances existing in the case. The juries, in some cases, have refused to make any allowance, in others, they have allowed at the rate of one degree for every twenty years, and in others, they have been influenced by ancient runnings and proof of possessions."

What then, is the character of the instruction which the court were desired to give in the *fourth* exception? They were asked to direct the jury, "that if they believed that the boundary, at the end of the first line of '*Dividing*,' was at the place the defendant had located the same, and that the division fences, between the former and present owners of the land called '*Dividing*,' and the land called '*Steele's*,' and the other adjacent lands, were on the second line of '*Dividing*,' as located by

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the defendants; and should further believe, that in former runnings of said line, in the life time of *Stephen Porter*, it ran where the defendants now have located it; that then, such facts were better evidence for the jury, to determine what allowance should be made, to correct the variation of the needle in running said line of '*Dividing*,' than the theory of allowing one degree for every twenty years." This instruction the court below gave, and in doing so, invaded, we think, the province of the jury.

It is for the court to decide on the admissibility of evidence; but the comparative value, or weight of testimony, is a question for the consideration of the jury, and it was for that tribunal, and not the court, to determine, whether the facts relied on by the defendants, were *better* evidence to guide them, in correcting the variation of the compass, than the rule sometimes adopted, of allowing one degree for every twenty years. The doctrine announced by the Court of Appeals, in the cases referred to, is, that whether any allowance is to be made for the variation of the compass, and if so, the rule or law by which that allowance is to be ascertained, is a question of fact for the determination of the jury, upon all the circumstances of the case. The judgment of the county court, in the case of *John H. Harlan*, and *Margaret A. Harlan's lessees*, against *David Brown*, is therefore reversed, and a *procedendo* awarded.

JUDGMENT AFFIRMED IN ONE CASE, AND REVERSED,
WITH A PROCEDENDO IN THE OTHER.

JOHN HARDESTY AND MATTHEW HARDESTY vs. JOHN F.
WILSON.—June 1845.

A judgment creditor issued a *fi. fa.*, and sold the land of his debtor. The sheriff, without his consent, gave time to the purchaser to pay for the land, and the purchase money not being all paid, the creditor ordered the sheriff to proceed to a re-sale of the property levied on. The debtor is not entitled to an injunction to stay such re-sale.

If the sheriff give time to a purchaser at his sale, to pay the purchase money, without the assent of the creditor, the latter is not bound by it.

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In a proceeding in equity where the sheriff is no party, the conduct of that officer cannot be inquired into.

It does not follow, that because a bidder is found upon an offer for sale of property, levied on under a *fi. fa.*, and he makes the highest bid, that the supposed sale to him discharges so much of the debt.

The bidder acquires no title to the thing purchased, but by payment of the purchase money, and if he fails to do this within a reasonable time, a re-sale may be lawfully made.

The seizure, upon a *fi. fa.*, is not a satisfaction of the debt.

APPEAL from the Court of Chancery.

On the 7th January 1845, the appellants filed their bill alleging, that a certain *John F. Wilson*, recovered a judgment against your orators, in, &c., at, &c., for the sum of \$1500, &c.; that the said judgment was obtained upon a note, given by said *John Hardesty* to said *J. F. W.*, with *Matthew Hardesty* as his security, for the purchase of a tract of land called "*Sandy Point*," and for which he, the said *John*, bargained with a certain *Zachariah McCeney*, but understanding that the title to the property was in said *Wilson*, he, together with said *McCeney* and *M. H.*, one of your complainants, went to the house of said *Wilson*, and gave his note for the purchase money, with *M. H.* as his surety, with a credit, as he believes, of two years. He, the said *J. H.*, further states to your honors, that in the succeeding summer, (he thinks in August 1841,) he sold his title in said land to a certain *John Hall*, before he took possession, with the knowledge and consent of said *J. F. W.*, who agreed to take said *Hall*, as purchaser in lieu of himself; and said *Hall*, some short time afterwards, when he took possession of the land, paid said *W.* part of the purchase money, in presence of said *M. H.*, one of your complainants, and that said *Hall* has been since that time, and is now in possession of said land; that said *J. F. W.*, has sued out of *Anne Arundel* county court, a writ of *fieri facias* upon the aforesaid judgment, and that the sheriff of said county, to whom said execution was directed, levied the same upon the said tract of land called "*Sandy Point*," and also upon another tract of land called "*Gravelly Hill*," the property of said *M. H.*; and that on or about the 2nd November 1844, sold the said tract of land

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called "*Sandy Point*," at public sale, to a certain *Jeremiah Wells*, for the sum of \$1200; that said *Wilson* was present at said sale, and was next highest bidder to said *Jeremiah Wells*, his bid being only ten dollars under that of said *Wells*, on which said land was sold; that said *Wilson*, as they have heard, and believe, gave time to said *Wells* for the payment of the purchase money, and as your orator *Matthew Hardesty*, avers, from information from said *Wells*, agreed to meet him at the city of *Annapolis*, at some future day, to pay the purchase money, and receive his title; that your orators have heard, and believe, that said *Wells* attended at *Annapolis* on the day appointed, prepared with the money to make his payment, as agreed upon with said *Wilson*, but that said *Wilson* did not attend.

Your orator, *M. H.*, further states, that inasmuch as the amount of the sale was insufficient to pay the debt, he asked time of said *Wilson* to pay the balance, and was allowed by him, ten or fifteen days, within which time, he paid the balance, amounting to \$485.83, to *Alexander Randall*, attorney at law, as will appear by his receipt for said balance; that the sheriff of *Anne Arundel* county, has again advertised both tracts of land, "*Sandy Point*" and "*Gravelly Hill*" for sale, at, &c., on Tuesday, 21st January, to satisfy said judgment, and being advertised that said proceedings is contrary to law, and having no remedy,, but by the aid of the Court of Chancery, they humbly pray your honor, to grant to your orators, a writ of injunction on said judgment and execution, directed to said *John F. Wilson*, and the clerk and sheriff of *Anne Arundel* county, commanding them to stay, and surcease all further and other proceedings in said judgment and execution, at least, against the tract of land called "*Gravelly Hill*," if not against both tracts, and against your said orators, until the further order of this court, as also a writ of *subpœna*, &c.

The complainants exhibited with their bill.

1. A short copy of the judgment of the appellee against the appellants, for \$1500. October term 1843.

2. The docket entries of the *fi. fa.* on said judgment.

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3. Memorandum of the sale of *Sandy Point* to *J. Wells*, for \$1200, made by the deputy sheriff, 2nd November 1844.

4. The statement of *Matthew Hardesty's* debt, for taxes, interest, and balance of *John F. Wilson's* claim of \$485.83, amounting to \$516.35, with the following receipt thereon:

“Received the above \$485.83, for *Thomas S. Alexander*, the attorney, to deposit to his credit.

13th November 1844.

A. RANDALL”

The Chancellor, on filing bond by the complainants, ordered an injunction.

The answer of the appellee, filed on the 22nd January 1845, admitted, that he did recover judgment against the complainants, as in his said bill is stated, and by the short copy thereof, filed by the complainants appear. He further admits, that the said judgment was recovered on a note or obligation of the said complainants, given to him to secure the purchase money of a tract of land called *Sandy Point*, sold by him to *John Hardesty*. He also admits, that afterwards, the complainants agreed to sell said land to one *John Hall*, and put said *Hall* in possession thereof; that this defendant, on being applied to for the purpose, verbally expressed his willingness to accept said *Hall* as purchaser, provided he would make to the defendant, a certain payment which has never been made, and consequently, he has had nothing to do with said *Hall*; that said arrangements, being oral, only, and not reduced into writing, is void, by the statute on which the defendant relies. He further insists, that it was entered into prior to the recovery of the judgment aforesaid, before the action was brought on said note, and if it afforded matter of defence to the complainants, against this defendant, such defence ought to have been taken at law, and the said judgment is relied on by the defendant, against any relief sought on the ground thereof. And this defendant, further answering, states, that said *Hall* abandoned possession of said premises upwards of twelve months ago, and the same was resumed by the said *John Hardesty*, who rented the same, and is now claiming the last year's rent due from the actual tenant thereof. And this defendant ad-

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mits, that having sued out a *fieri facias* on said judgment, the same was laid on the said tract called *Sandy Point*, and another tract called *Gravelly Hill*, and being exposed to sale by the sheriff of *Anne Arundel* county, the tract called *Sandy Point* was bid in by one *Jeremiah Wells*, as stated in said bill; and he admits, that exhibit B was drawn up and signed by the deputy of said sheriff, as stated in said bills. He further admits, that the said *Wells* was not prepared, at the time, to pay the purchase money, but expressing a willingness to pay as soon as the sheriff could make out his title, the actual payment was postponed, and the writ was returned by the deputy to the sheriff; that it is usual to give such indulgences to purchasers at sheriff's sales, in order that the returns and conveyances may be prepared and executed when the money is paid, and, consequently, in the present case, the defendant was not asked, nor did he give his assent to the arrangement. He further admits, that he heard, from time to time, that the said *Wells* delayed payment of the purchase money, on the pretext, that he was not satisfied with the title to said property, and that on being applied to by the counsel for said *Wells*, this defendant expressed his willingness to show his title to said land, and to convey the same on receiving his purchase money, as aforesaid; that all the indulgence which was enjoyed by said *Wells* was granted him by the sheriff, and on his, the sheriff's, responsibility; that this defendant was advised he could not coerce the sheriff, until the return day of the writ, and further, that it would be better to wait a few days with the sheriff and purchaser, in order to have the difficulty removed, than to insist on a more rigid procedure. But finding at last, that the said *Wells* was trifling, he required the sheriff to proceed, by a re-sale, or otherwise, to make the amount due on the execution, and the property was advertised as in said bill is stated. He admits, that he received through his attorney, the sum of \$485.83, or thereabouts, on account of said execution; but he was informed, by his said attorney, and believes it was received on account generally, his said attorney refusing, or declining to look to said *Wells* as pur-

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chaser for the amount of his bid, or to recognize his purchase until the money was ready to be paid to him. This defendant therefore insists, that said sale by the sheriff, under the circumstances aforesaid, does not bind him, or in any manner impair his right to make the money yet due on his execution aforesaid; and that as the said purchaser has failed to pay the purchase money bid by him, as aforesaid, he acquired no title to said land. Wherefore, this defendant prays the injunction granted in this case may be dissolved, and he be dismissed with costs, &c.

On the 10th February 1845, the defendant moved for a dissolution of the injunction, and in April 1845, the complainants filed exceptions to the sufficiency of the answer. At the hearing of the motion to dissolve the injunction, the Chancellor (BLAND,) over-ruled the exceptions, and sustained the motion.

The complainants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By MURRAY and STEELE for the appellants, and
By WELLS and ALEXANDER for the appellees.

MAGRUDER, J., delivered the opinion of this court.

Every thing in the bill of complaint, which may be considered as constituting the equity of the complainant's case, seems to have been satisfactorily answered. If it was improper for the sheriff, to give the indulgence which he gave to the purchaser, it was given not at the instance, or with the consent of the plaintiff at law. In this suit, to which the sheriff is no party, we cannot inquire into the conduct of that officer. The law of the case, 2 H. & G. 262, cannot be questioned.

As to the alleged payment to *Mr. Randall*, it can entitle the complainant only to a credit for so much as *Randall*, acting for the plaintiffs' attorney, received.

It does not follow, that because a bidder is found, and he makes the highest bid, that the supposed sale to him, discharges so much of the debt. The highest bidder acquires no title to

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the thing purchased, but by payment of the purchase money, and if he fail to do this within a reasonable time, a re-sale may lawfully be made. We discover nothing in this case, which entitles the complainant to relief in equity.

With respect to the point, for which most of the authorities were cited by the solicitors of the complainants, this court decided otherwise, in the case of *Sasser ag't. Walker's ex'ors*, 5 G. & J. 102. But surely, it would not follow, that a sale of the property on which the first levy is made, can be hindered by the defendant at law. If, as it is supposed, the seizure is a satisfaction of the debt, the defendant would no longer have any interest in it, and could not complain that a sale of it was about to be made.

The order of the Chancellor, so far as it over-rules exceptions filed to the answer, cannot be before us at this time.

So much of the order as dissolves the injunction, is affirmed, appeal from the rest is dismissed.

ORDER AFFIRMED AS TO INJUNCTION.

THE STATE OF MARYLAND *vs.* WILLIAM E. MAYHEW, PRESIDENT OF THE FARMERS AND PLANTERS BANK OF BALTIMORE.—*June* 1845.

The act of March session 1841, ch. 23, provided for a general assessment of all the real and personal property within this State, and directed, that the capital stock of the several banks, and other incorporated institutions of the State, should be assessed to its owners at its cash value, and taxed at one-fourth of one per centum.

All the property of such banks, &c., the stock of which was thus assessed and taxed, being exempted from taxation, the taxation of such stock is constitutional.

To relieve the proprietors of such stock, and facilitate the collection of the tax thus imposed, the act of 1843, ch. 289, made it the duty of the president, (or other proper officer) of such corporations, semi-annually, to set apart, and withhold out of the dividends, or profits, the amount of the tax levied on such stocks, and pay the same to the treasurer of the State.

The act of 1843, is a legitimate exercise of power, incident to the sovereign right of levying taxes for the support of government.

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By the act of 1843, the place and mode of levying and collecting such tax are changed; it was no longer collectable where the stockholders resided; it ceased to be a debt or duty chargeable on them: they were exonerated from all personal liability for its payment: the stock, itself, stood exempt from its payment, and the security of the State therefor, became contingent.

For the recovery of such tax, the State has no lien on the stock; can maintain no action at law, either against the stockholder, bank, or any officer of the bank, in his official character; nor an action for money, had and received against any such officer, in his individual capacity.

But the State has a legal right to be paid out of the dividends declared, or profits made, the amount of the tax on the assessed value of such stock, and for the assertion of such right, having no appropriate legal remedy, is entitled to the writ of *mandamus* against the president or other proper officer of any such corporation.

The president of a bank, &c., is not, by the nature of the duty imposed upon him, by the act of 1843, created a State officer, a collector of the taxes due by the stockholders of the bank.

The object of the act was to command such president, he being already in possession thereof, to pay to the treasurer of the State the amount of State taxes in his hands, which, under the act of 1843, he had no authority to pay to any other person.

The General Assembly has the right, by legislation, to impose upon all property within the State, a just and proportionately equal public tax; to provide all means, details necessary for its speedy collection, by summary process of execution, or other reasonable or available means.

A power exercised by the General Assembly, from the adoption of our Constitution till the present time, a period of nearly seventy years, ought to be deemed almost conclusive evidence of its possession by that body.

A cotemporaneous construction of the constitution of such duration, continually practised under, and through which, many rights have been acquired, ought not to be shaken, but upon the ground of manifest error and cogent necessity.

Where the law provided for the valuation of bank stock, and it had been valued accordingly, and an act of Assembly prescribed the rate of taxation, and directed who should pay it, it cannot be said that the tax on such stock has not been levied: it is a legislative levy, wholly irrespective of the ownership of the stock.

As soon as a dividend is declared, the right of the State to so much of it as is required to be paid on account of the stock taxed, is fixed and indefeasible, and over-rides all other liens, claims or rights, by whomsoever asserted, unless, perhaps, it were in conflict with a preferred claim of the *United States*.

A citizen is not necessarily discharged from the obligation to perform a duty enjoined, by law, for the public good, because it imposes on him some additional labor, trouble and expense; as to perform militia duty, vote at

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the election of public officers, furnish true statements to assessors, obey the summons of executive officers, or arrest felons: in these, and other instances, the citizen must obey the law.

APPEAL from *Baltimore County Court.*

This was an application for a writ of *Mandamus*, upon the petition of the State. It alleged, that the *General Assembly of Maryland*, by the act of 1841, ch. 23, entitled, "*An act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State;*" among other things enacted, that all stocks or shares, in any bank or company, incorporated by the said State, together with all other property thereby subjected to assessment and taxation, should be valued agreeably to the directions of said act, and chargeable according to such valuation, with the public assessment; which said assessment or tax, by the State of *Maryland*, was, by the said act of Assembly, fixed at twenty cents, or one-fifth of one per cent. in every hundred dollars worth of assessable property, for each and every year thereafter, to be collected as therein prescribed; and, that afterwards, by another act of the General Assembly of *Maryland*, made and passed at December session 1841, ch. 328, a further additional annual tax, of five cents in the hundred dollars, to be levied and collected in the same manner as the first mentioned tax, was imposed upon all the property assessed by the first mentioned act of Assembly, the said taxes collectively amounting to twenty-five cents, or one-fourth of one per cent. annually, in every hundred dollars worth of such property.

Your petitioner further states, that by the second section of the said first mentioned act, the city of *Baltimore*, in said State, was divided into assessment districts, as therein specified; that by the ninth section thereof, it was declared to be the duty of the assessors, appointed by said act, to value all such assessable property at its full, cash value, in the names of the owners thereof respectively; that by the sixteenth section thereof, it was enacted, that for the purpose of valuing the stock of banking, and other private corporations, held by non-resident stockholders, it was thereby declared and understood, that the stock

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of a banking, insurance, or other corporation, usually termed a moneyed institution, should be situated at the place in which the principal office for transacting the business of such corporation should be situated, and for the effectual collection of the taxes assessed on the stock of private corporations, held by non-residents, it was enacted, by the seventeenth section thereof, among other things, that the stock of corporations, liable to assessment under said act, held by persons, non-residents of said State, should be valued at its actual cash value, to, and in the name of such stockholders respectively; but, that the tax assessed on said stock should be levied and collected from said corporation, unless paid by such stockholders, and should be charged to such stockholders respectively, and be a lien on their respective stocks: that by another act of the General Assembly of *Maryland*, made and passed at December session 1841, ch. 281, it was made the duty of the president, or other proper officer of every bank, or other private corporation in the said State, to set apart and withhold, out of the dividend of the stock of such corporations, the amount of the tax levied by the first mentioned act semi-annually, and pay the same to the collector of the county, city, or district, in which such bank or corporation might be situated: that the General Assembly of *Maryland*, in substitution for the former enactments on the subject, at its December session 1843, made and passed an act, entitled, "An act entitled a supplement to the act entitled an act to facilitate the collection of a portion of the tax levied in pursuance of the act passed at March session 1841, ch. 23," wherein it is enacted, that it should be the duty of the president, or other proper officer of the banks, and of all other of the incorporated institutions of this State, semi-annually, after the passage of the said act, (which passed on the 8th March 1844,) to set apart, and withhold, out of the dividends or profits, when dividends are not declared on the stock of said banks, or other incorporated institutions, the amount of the tax levied on the stocks of said banks, and other incorporated institutions, under the act of March session 1841, ch. 23, and its supplements, without reference to the place of residence of

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the stockholders therein, and to pay the said tax to the treasurer of the said State, who should give proper receipts therefor: that at the time of the passage of the first mentioned act of Assembly, there was, and from thence hitherto has been, a certain bank of the said State, duly incorporated by the laws of the said State, under the name and style of the *Farmers and Planters Bank of Baltimore*, and that its principal office for the transaction of its business then, was and is situated in the said city of *Baltimore*, in the State aforesaid, in the fourth assessment district of said city; and that by the force and exigency of said first mentioned act, the stock of said bank then was, and is situated in said city and district, and that *William E. Mayhew, Esq.*, of the city of *Baltimore*, from thence hitherto has been, and yet is, the president of the said bank.

Your petitioner further states, that shortly after the passage of the said first mentioned act of Assembly, the stock of the said bank was duly valued by the proper, then assessors, under said act, at the city, and assessment district aforesaid, and that twenty-three thousand, four hundred and twenty-five shares of the stock of said bank, being the number of assessable shares, were then, by them, valued at \$19.50 a share, being the cash value thereof, amounting, altogether, to the sum of \$456,787.50, and that the same valuation, under the said act, has ever since subsisted, and is now in force; that at the time of the passage of the last mentioned act of Assembly, of December session 1843, and ever since the said shares of stock, so valued as aforesaid, were, and are liable to pay the said taxes, under the two first above mentioned acts of Assembly, to the said State, amounting, annually, to \$1141.96; and that since the passage of the said last mentioned act of Assembly, the said bank has made great profits, and has declared three several dividends, that is to say, a dividend on the 1st July 1844, and dividends on the 1st day of January and July respectively, in the year 1845, each of which said dividends, far exceeded the amount of such taxes due on the said shares of stock at the time such dividend was declared: that by force of

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the last mentioned act of Assembly, it has been, and is, the duty of the said *Wm. E. Mayhew*, as such president of the said bank and its proper officer in that behalf, ever since the passage of such act, semi-annually to set apart and withhold, out of such dividends or profits, the sum of \$570.98, being the moiety of the taxes, annually since accruing and levied on the said stock at such valuation as aforesaid, and pay the same to the treasurer of the said State, upon his proper receipts therefor, for the benefit of your petitioner; but although the said treasurer has always been, and is, ready and willing to give such receipts therefor, the said *William E. Mayhew*, so being such president of the said bank, as aforesaid, has utterly refused, and still refuses, to comply with the exigencies of the said last mentioned act, and semi-annually to set apart and withhold such last mentioned sum out of such dividends or profits for such taxes as aforesaid, and pay the same over to the said treasurer of the said State, for the benefit of your petitioner, and the sum of \$1712.94, for such taxes, as aforesaid, accruing since the said passage of the said last mentioned act, remains in arrear, and wholly unpaid to the said treasurer of the said State. *Prayer for a writ of Mandamus*, to be directed to the said *Wm. E. Mayhew* of the city of *Baltimore*, in the State of *Maryland*, *President of the Farmers and Planters Bank of Baltimore*, commanding and enjoining him, according to the exigency of such last mentioned act of Assembly, semi-annually to set apart and withhold out of the dividends, or profits, when dividends are not declared upon the said shares of stock so valued as aforesaid, the sum of \$570.98, being the amount of the taxes levied on the said shares of stock of the said bank, under the act of March session 1841, ch. 23, and its supplements, and pay over the same to the treasurer of the State of *Maryland*, upon his proper receipt therefor; and, also, to pay over to the said treasurer of the State of *Maryland* the said sum of \$1712.94, for such taxes on the said shares of stock so remaining in arrear and unpaid, as aforesaid, upon his proper receipt therefor, according to the exigency of such act of assembly.

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And, thereupon, on motion of the State of *Maryland*, aforesaid, the county court, (LEGRAND, A. J.,) passed the following order, to wit:

Ordered, by *Baltimore* county court, this 29th day of November, A. D., 1845, that the *President of the Farmers and Planters Bank* shew cause, on or before three o'clock this day, why *Mandamus* should not issue, as prayed, in the foregoing petition, provided a copy of this order, and said petition, be served on the president aforesaid, on or before two o'clock this day.

The parties aforesaid, by their attorneys aforesaid, file in court here, the following agreement and admission, to wit, (annexed to the petition aforesaid:) It is admitted, that the facts set forth in the above petition, are true. It is also admitted, to be taken with the said facts, into the consideration of the court, that to pay over the tax, as required by the acts of Assembly, mentioned in the within petition, would be attended with additional labor, trouble and expense, to the said *Mayhew*, as president of the said bank. It is agreed, that all proceedings preliminary to a peremptory *Mandamus*, are waived on both sides, and that the above petition, with this statement, be submitted to the said court for its judgment, and that said judgment shall be rendered *pro forma*, against the State, with liberty of appeal.

On the 29th November 1845, in compliance with the agreement of parties filed, it was ordered by the court, that the rule for the *Mandamus*, is discharged *pro forma*, with costs, with the right of appeal reserved to the State.

The State prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By RICHARDSON, attorney general of *Maryland*, for the State, and

By DULANY and McMAHON for the appellee.

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DORSEY, J., delivered the opinion of this court.

We deem it unnecessary to decide a number of questions, argued with great ability, by the counsel of both parties; because, from the view we have taken of the record before us, they do not arise in this case.

According to our interpretation of the act of Assembly in question, the legislature have not attempted to exercise some of the powers so vehemently complained of, on the part of the defendant.

The act of March session 1841, c. 23, having provided for a general assessment of all the real and personal property within the State, directed, that the capital stock of the several banks, and other incorporated institutions of this State, should be assessed at its cash value. And all the property of such banks, and incorporated institutions, the stock of which was thus assessed and taxed, being exempted from taxation, as far as concerns the present controversy, the taxation of such stock, was decided to be a constitutional tax, both by the Supreme Court of this State, and of the *United States*. Difficulties having arisen from the mode provided, for the collection of the tax on said stock; and the peculiarly fluctuating ownership of such property, frequently rendering it a matter of controversy, by whom the tax ought to be paid, to remedy such evil; and to relieve the owners of stock, who might sell the same, from the inconvenient necessity of going to the county town, to attend a meeting of the justices of the levy courts, commissioners of the tax, or county commissioners, (as the case may be,) and furnishing proof of the sale and transfer of the stock, that it might be deducted from the amount, standing against them on the books of assessment; and to relieve the stockholders, as well as the other tax payers of the counties, city and district, from the payment of a levy of from three to ten per cent., on the amount of tax levied on such stock; and with a view, to provide a far more just, convenient and safe mode of collecting the public revenue, arising from the capital stock of banks, and other incorporated institutions in the State, the legislature, by the first section of the act of 1843, chap. 289, enacted, "that it shall

be the duty of the president, or other proper officer of the banks, and of all other incorporated institutions of this State, semi-annually, after the passage of this act, to set apart and withhold out of the dividends, or profits, when dividends are not declared, on the stock of said banks and other incorporated institutions, the amount of the tax levied on the stocks of said banks, or other incorporated institutions, under the act of March session 1841, chapter 23, and its supplements, without reference to the place of residence of the stockholders therein, and to pay the said tax to the treasurer of this State, who shall give proper receipts therefor." And by the third section of the said act, it is enacted, "that on the first day of June next, the several levy courts, commissioners of the tax, and the appeal tax court of *Baltimore*, shall deduct from the amount of the assessment of property, in the several counties, *Howard District*, and the city of *Baltimore*, so far as relates to the taxes imposed, for the use of this State, the assessed value of the aforesaid stocks, and that thereafter, the accounts for taxes due this State, shall not include the tax upon the aforesaid stocks."

To the provisions of the first section of the said act of Assembly, a great variety of objections have been taken, and elaborately and ingeniously pressed upon the court.

First it is insisted, that the defendant, from the nature of the duty imposed on him, is created a state officer, a collector of the taxes, due by the stockholders of the bank. To this proposition, we cannot yield our assent. Neither the design, nor operation of the law, will warrant such an interpretation of it. Its object was, not to require the officer of the bank, to collect taxes due to the State; but to command him, he being already in possession thereof, to pay to the treasurer, the amount of state taxes in his hands; which, under the act of 1843, he had no authority to pay to any other person. By the act of March 1841, c. 23, the stock of the banks, owned by residents of the State, was assessed to the individual stockholders; and the tax thereon, was to be collected from them, in the counties, city or district in which they respectively resided. But, under

the act of 1843, the place and mode of levying and collecting this tax, are entirely changed. It was no longer collectable where the stockholders resided: it ceased to be a debt, or duty chargeable upon them: they were exonerated from all personal liability, for the payment thereof. Even the stock itself, stood exempt from the payment of the tax. The only security which the State had for its payment, was contingent; it depended entirely upon the contingency of the banks declaring dividends, or making profits, without declaring dividends. And out of those dividends or profits, by terms of the most explicit enactment, the tax on the stock, was directed to be paid to the treasurer of the State, by the proper officer of the bank; that is, by him, in whose hands the dividends and profits of the bank, are placed for safe keeping, and payment over to the persons entitled to receive the same. And if the objections, taken to the constitutionality of this act of Assembly, be not sustainable, he was as imperatively bound to pay the tax in question, in the manner directed, as he would have been, had the board of directors enjoined him to do so.

The next objection taken to this act of Assembly is, that it is in violation of the sixth article of the Bill of Rights, which declares, "that the legislative, executive, and judicial powers of the government, ought to be forever separate and distinct from each other:" and of the twenty-first article of the same instrument, which provides, "that no free man ought to be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land."

According to the argument in behalf of the defendant, if carried out to its legitimate extent, the legislature may cause an assessment to be made, and prescribe the rate of taxation, but there its powers upon the subject cease. It must be left to some judicial tribunal of the State, to ascertain the amount of indebtedness of the individual tax payers; and when thus ascertained, the payment of taxes, can only be enforced by a resort to the judicial tribunals of the State, in the same manner that debts are recov-

ered by one citizen from another. If such be the constitutional restrictions imposed on the powers of taxation, the sovereign authority of the State is virtually disrobed of its most important and invaluable rights, of the very essence of sovereignty. The delays and expenses, incident to such a system of collecting the public taxes, would effectually paralyze the right arm of government, and render it wholly incompetent, to the accomplishment of the all important objects for which it was constituted. That the General Assembly of *Maryland* has the right, by legislation, to impose upon all property within the State, a just, and proportionately equal public tax; and, in like manner, provide all the means, details, necessary for its speedy collection, by summary process of execution, or other reasonable or available mode is, we believe now, for the first time, made the subject of a doubt. That such powers should have been exercised, without being questioned, from the time of the adoption of our Constitution, till the present time, a period of nearly seventy years, ought to be deemed almost conclusive evidence of their being possessed by the legislature. A cotemporaneous construction of the Constitution of such duration, continually practised under, and through which, innumerable rights of property have been acquired, ought not to be shaken, but upon the ground of manifest error and cogent necessity. If imperious necessity be appealed to, in relation to the existence of such a power, it sustains it with resistless force. And if a case can be conceived, in which, both as to time and circumstances, this court would shrink, with repugnance, from the innovation now urged upon it, this is that occasion.

It has been contended, that the tax, for the recovery of which the present proceedings were instituted, has never been levied; and, therefore, the officer of the bank is neither authorised nor bound to pay it to the treasurer. The answer to this suggestion is, that the acts of Assembly have made the levy. The assessment of the stock having been made, and the rate of taxation prescribed, and the obligation for its payment being imposed on the bank officer; every thing has been

done by the legislature, which is requisite for it to do, to render the tax available to the State. The tax, by the act of Assembly, is directed to be paid out of the dividends or profits of the stock, not by the owners thereof. It is a legislative levy, wholly irrespective of the ownership of the assessable stock. When the General Assembly confide to the levy courts, or county commissioners, the power and duty of making what is called "the levy of the taxes;" that is, of making out the "tax list," and delivering a copy thereof to the collectors; it is done, not because the legislature do not possess the power of discharging the same duty itself, by express legislative enactment, but because the power can be more conveniently and advisedly exercised by the justices of the levy courts and county commissioners, to whose custody are confided the books of assessment containing all transfers of assessable property; without which transfer books, no "levy list," or "tax list," (as it is indiscriminately called,) can be correctly made out.

It is also contended, that a *Mandamus* ought not to issue in this case, because the officer of the bank, to whom it will be directed, is ignorant of, and has no means of ascertaining the amount of the tax to which the State is entitled; the stock of the bank being assessed at different values, in the different portions of the State, where the stockholders reside. If this could, in any case, (considering the facility with which the requisite information could be obtained,) furnish a ground for refusing to comply with the requisitions of the act of 1843; it certainly has no application to the case now before us. Here all the facts stated in the petition are admitted to be true; and the petition expressly states, that all the stock of the bank was duly valued, by the proper assessors, at \$19.50 per share, so that the same rate of tax is chargeable in respect to each and every share of the stock of the bank. There is, therefore, in this case, no pretence for the alleged inability of the officer of the bank, to comply with the requirement of the act of Assembly, by reason of any diversity in the assessed value of the shares of bank stock. And there is still less reason, in the refusal of the proper bank officer to pay the State tax, on

the ground of the injustice done to the stockholders of this bank, by the tax laws of the State. By taxing the stock of the bank, instead of its bills, bonds, notes, judgments, mortgages, and all its other property, real and personal; the bank does not pay, perhaps, one half of the tax it would pay, if its property were assessed and taxed in the same manner that similar property of all citizens of the State is now assessed and taxed.

It is further said, that the act of 1843, if complied with, would render taxation unequal, by compelling the tax of the stockholders to be paid in cash, whilst other tax payers possess the power of paying in coupons. Such was not the design, nor is it the practical operation of that act of Assembly. The legislature, by it, neither intended to increase nor diminish the amount of the tax levied upon bank stock. And the treasurer of the State receives, from the officers of the banks, coupons in payment of such taxes, in the same manner that they are received in payment of taxes due by the citizens of the State.

Neither is the objection to the act of 1843 well founded, that it compels the officer of the bank to pay the tax upon the whole capital stock of the bank, although portions of it might be exempt from taxation, as being owned by other banks or incorporated institutions, (the stock of which was taxed,) or as being owned in such manner, as to be exempt from taxation under the first section of the act of March 1841, chapter 23. All transfers of bank stock, and the names of its owners, appear upon the books of the bank, and should any of its stock be exempt from taxation, as above mentioned, the officer of the bank is not bound to pay the tax upon it, nor would the treasurer of the State insist upon its payment. But the conclusive answer to such an objection, in this case, is this, that the petition states, and its statements are admitted to be true, the assessment and tax of the stock in 1843, and its then and continued liability to such assessment, up to the time of the filing of the petition now before the court.

Another of the reasons, assigned for the non-payment of the tax to the treasurer, is, that the bank may have a lien upon the dividends for a balance due to it by the owner of the stock. The obvious answer to this is, that as soon as a dividend is declared, the right of the State to so much of it as is required to be paid on account of the tax, is fixed and indefeasible, and over-rides all other liens, claims, or rights by whomsoever asserted, unless, perhaps, it were in conflict with a preferred claim of the *United States*.

It has been urged, too, as an obstacle to the issuing of a *Mandamus* in this case, that the board of directors may have forbidden the payment of the tax by the officer of the bank. The record presents no such fact to the court, and we would very reluctantly credit its existence. Had such a prohibition been made apparent to the court, we feel assured it would have lent a willing ear to an application of the attorney general, for the interposition of the court in removing the difficulty.

The only remaining ground on which the officer of the bank places his refusal to comply with the mandates of the law, is that a compliance would subject him to "additional labor, trouble and expense." To what extent, or in what way such "additional labor, trouble and expense" would be incurred, is left wholly unexplained. A citizen is not necessarily discharged from the obligation to perform a duty, enjoined by law, for the public good, because it imposes on him some additional labor, trouble and expense. The law requires a certain portion of its citizens to perform militia duty, by attending public musters on certain days in the year, which subjects them to much more labor, trouble and expense, than that imposed upon the officer of the bank in the discharge of the duty, now the subject of our consideration. The law requires every voter to go to the polls and vote at the election of public officers. It also enjoins upon every taxable inhabitant of the State, the duty of furnishing to assessors, a true and detailed statement of all his property liable to taxation, and of all such property in his possession, though belonging to other persons. A duty, in many instances, attended with far more labor,

trouble, and expense, than is required of the bank officers, (under the act of 1843,) in consequence of the particular situation they occupy, in regard to important rights and interests of the State. Every citizen summoned by an executive officer to aid him in the preservation of the public peace, or in the service of civil or criminal process, or in the arrest of a felon, is bound to perform the service required, although it may subject him to danger, as well as "additional labor, trouble and expense." Yet in all these, and numerous other instances of the kind, which might be enumerated, nobody ever doubted the obligation of the citizen to obey the mandates of the law. Suppose, instead of providing for the collection of taxes, through the instrumentality of collectors, the legislature had dispensed with collectors, and required all those bound for the payment of taxes to pay them to the treasurer, at the treasury of the State. Could the constitutionality of such legislation be, for a moment, the subject of a doubt? We think not. For the time, manner of payment, and collection of the public taxes, it is the peculiar province of the legislature to provide. It may, in its discretion, make the tax levied, a charge or lien on the property assessed, or its profits, or a personal charge or debt to the owner thereof. In the case of bank stock, the tax upon it is made, as it were a lien upon its dividends or profits, and to be paid thereout; and such dividends, or profits, being in the hands of the proper officer of the bank, he is required, by the act of 1843, to pay the portion thereof, to which the State is entitled for taxes, to the treasurer of the State. In this enactment, we can discover nothing unjust or oppressive, or in anywise conflicting with any thing to be found in the Bill of Rights, but we regard it as the legitimate exercise of a power incident to the sovereign right of levying taxes for the support of government.

The defendant having failed to inform us how, or to what extent, the duty imposed on him by the act of 1843, has subjected him to "additional labor, trouble and expense," let us inquire whether this "additional labor, trouble and expense" be so unreasonable, unjust and onerous, that this court, in the

exercise of a sound, judicial discretion, ought to deny to the State, the process that has been applied for, in its behalf. To do this, we must ascertain what are the acts to be done by the bank officer, in discharge of the duty assigned him by the act of Assembly? He must multiply the number of shares, to wit : 23,425 by \$19.50, the assessed value of each share ; and of the amount thus obtained, ascertain what is the one-fourth of one per cent. Having thus discovered the amount of the State tax if paid in money, with the prices current before him, which in a newspaper or otherwise, is to be found in every banking institution, he sees the price of coupons, and calls on a broker, or drops a line to a broker to call on him, purchases a coupon for the amount of the State tax, encloses it in a letter to the treasurer, and the next day, or the day after, receives a letter from the treasurer, containing the appropriate receipt. The postage on this letter being five cents, is, as it ought to be, paid by the bank : so that in truth, not a farthing of expense is incurred by the officer of the bank, in the discharge of this, his most onerous duty. He then divides the sum paid for the coupon, by the aforementioned number of shares, and the quotient is the amount of the tax attributable to each share of stock. He then directs the clerk of the bank, by whom the statement is made out for the payment of the dividend, to deduct from the dividend of each stockholder the amount, arrived at by multiplying his number of shares by the sum payable as the tax on each share, and there ends all the "additional labor, trouble and expense," of which the bank officer complains. If the entire labor and trouble thrown, in this case, upon the officer of the bank, were to be wholly performed by a single competent clerk, he would not be thus occupied for the half of a day. And if the directors of the bank would, as they ought to do, cause the coupon, for the payment of the tax on its stock, to be purchased before declaring the dividend, the officer of the bank, would be saved more than half the labor and trouble cast upon him by the act of 1843. This is a computation of the duties of the bank officer as to the first dividend, which, in a great degree, supercedes the

The State vs. Mayhew.—1845.

necessity of similar calculations at subsequent dividends. The services thus rendered by the bank officer, though nominally for the State, are in truth performed in the way of his vocation, for the benefit and as the agent and representative of his employers, of whom the State might lawfully have exacted, the services thus performed by him. Under such circumstances, can this court do otherwise, than regard this alleged "additional labor, trouble and expense," to the officer of the bank, as a ground wholly insufficient, to avoid the payment of taxes most justly due to the State.

The agreement of the counsel filed, in this cause, renders it unnecessary for us to say any thing, as to the propriety of applying for a *Mandamus* against the president, instead of some other officer of the bank.

The only remaining question to be considered, (if indeed a question it can be called,) is whether, in the case before us, a *Mandamus* is the appropriate remedy, to restore the State to those rights, which are illegally and unjustly withheld from it. For the recovery of the tax on the stock of the bank, the State has no lien on the stock; it can maintain no action at law against the stockholder; nor against the bank; nor against any officer of the bank in his official character. Nor can it maintain an action for money had and received, against any officer of the bank, in his individual character. Yet, under the act of 1843, we are of opinion, that it has a clear and unquestionable right, a legal right, to be paid out of the dividends declared, the amount of the tax imposed on the assessed value of the stock of the bank. And for the assertion of this right, it has no appropriate legal remedy. According then to all the authorities, a *Mandamus* is the proper remedy; and it would be a reproach to our system of jurisprudence, if it were denied to the State on the present occasion.

The *pro forma* judgment of the county court is reversed, with costs, and a procedendo awarded.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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ACTION, RIGHT OF

1. The failure of a plaintiff to pursue one legal remedy against a sheriff in default, cannot be construed into the abandonment of another legal remedy against that officer, for the same default. *State, use of Creedy vs. Lawson*, 62.
2. The act of 1832, ch. 280, is not repealed by the act of 1834, ch. 89. The latter gives to the creditors of foreign corporations an additional remedy. *Georgia Ins. & Trust Co. vs. Dawson*, 365.

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ACTION UPON THE CASE.

1. Where an inquisition was taken, returned, and ratified, according to law, upon proceedings by a rail road company, which found that a piece or parcel of land was wanted by the company for the construction of their road, and assessed the damages which the owner of the fee would sustain by the use and occupation of his land for the purpose aforesaid, at, &c., all questions having relation to the damage done by the location and construction of the road are terminated and concluded by such inquest. *Balt. & Sus. R. Road Co. vs. Compton et. al.*, 20.
2. And hence in an action brought by the owner of a fee against the company for having, after the construction of the road through his land, (the benefits of which construction to the plaintiff had been submitted to the jurors upon the inquisition aforesaid,) abandoned the same, and constructed the road anew in another location, off the plaintiff's land, the plaintiff cannot give evidence of the damage which would accrue to him from such original construction independent of the inquisition. *Ib.*
3. After a rail road company had constructed its road by authority of law, through the plaintiff's land, condemned for that object, they were authorised to alter the location of their road between two given points :

ACTION UPON THE CASE—*Continued.*

they re-constructed the road, and abandoned that part which had been made through the plaintiff's land. **HELD:** that the authority derived from the legislature to alter the location, did not exempt the company from liability to the plaintiff for the loss sustained by him by reason of such abandonment. *Ib.*

4. Where a rail road company had constructed a road, then abandoned it in part, and changed the location *pro tanto*, a plaintiff through whose land the road originally passed, having sustained no damage or injury in fact, by the alteration, cannot maintain an action for such change of location. *Ib.*
5. In an action for damages, for diverting the course of a stream from its natural channel, on the plaintiff's land, the defendant may show, that the diversion was made on his lands above those of the plaintiff, and that it was rather a benefit, than an injury to the plaintiff; or that it was made in virtue of a verbal agreement between plaintiff and defendant, that the latter might make the diversion, for the purpose of working a mill to be erected by the defendant on his own land, if the defendant would allow the plaintiff the use of a road through the defendant's land, and the execution of such agreement; or that the plaintiff entered into such a contract with the defendant, conferring the privilege, with a fraudulent design, and for the purpose, of extorting money from him. *Addison vs. Hack*, 221.
6. Such evidence is admissible in mitigation of damages; and for the purpose of showing that the defendant was not a trespasser, *ab initio*, for continuing the diversion after a countermand of his authority by the plaintiff; or that he could not be made responsible in damages for acts done upon his own land, with the verbal permission and authority of the plaintiff. *Ib.*
7. The maxim, "*volenti non fit injuria*," illustrated. *Ib.*
8. Where one party authorises another to divert the channel of a stream, flowing through the lands of both, by means of a license which is countermandable in its nature, and the authority is exercised as granted, the party who has the power of countermand, can only be restored to his rights, by doing justice to the other, and tendering him the expense which he has incurred under the license. *Ib.*
9. Where the plaintiff verbally agreed to abandon the use of a stream of water in the manner in which it had been accustomed to flow on his land, and the abandonment was consummated by the execution of his license, from that moment, his right to the use of the water, as it formerly flowed in its natural channel, became extinct; and it was no longer appurtenant to his land. *Ib.*
10. Such license conveys no estate, interest, or use in the land; is not within our registry acts; nor calculated to mislead purchasers. *Ib.*
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ARBITRATION—AWARD.

1. The confession of a judgment, to be released on payment of what F shall say is due, cannot be considered as a reference under the act of 1778, ch. 21. It is a final judgment. *State, use of Welsh and wife vs. Jones et. al.*, 49.
2. The various provisions of that act, all contemplate a case still pending in court, and awaiting the return of the award before a judgment is to be rendered. *Id.*

ARBITRATION—AWARD—*Continued.*

3. The words *payment* and *due* in such a confession import that a sum of money, was alone in the view of the parties, and hence no other authority was given by it, but to certify the sum of money on payment of which the judgment should be released. *Ib.*
4. Under such a confession, the party who was to ascertain the sum has no authority to award or determine, that the judgment should be released on payment of, &c., in *negro property*, at the original appraisement, belonging to the estate of H. *Ib.*
5. Where parties submit matters in controversy, for the purpose of a final determination, and the arbitrators make an award, the original contract or cause of action is merged by the submission and award; and there is no distinction, in this respect, between submissions by parol, and by bond. *Randall vs. Glenn*, 430.
6. There is a distinction between a submission by parties to the judgment of two or more individuals who are to decide the controversy, and a reference of a collateral, incidental matter of appraisement, or calculation, or the submission of a particular question, forming only a link in the chain of evidence, not calculated to put an end to controversy. *Ib.*
7. The recital in a mortgage executed and delivered by R. to G., that he stands indebted to G. in a large sum of money, for advances, the amount of which is to be ascertained upon examination of their accounts by J. and M., mutually appointed by R. and G., for that purpose, is a reference of a mere matter of calculation, and ascertainment as to the amount of money advanced; an ascertainment in conformity to such recital does not merge the original contract. *Ib.*
8. An ascertainment of the amount due, under such circumstances, is competent evidence, in an action of debt brought by G. against R., for money lent, advanced, had, and received, under the plea of *nil debet*, as an admission of the defendant of the amount due the plaintiff. *Ib.*

ASSESSMENT. See PRIMARY SCHOOLS.
TAXES.

ASSUMPSIT.

1. The condition of B's bond of the 30th May, 1835, recited, that in consideration of \$500, and three promissory notes amounting to \$500, he would convey to R a certain house and lot, when all the conditions of his bond should be complied with—at the foot of this bond was a receipt for \$500: another paper signed by B, dated in 1841, certified, that he had taken back the house and lot, for the same amount of money which R agreed for and purchased of him, and "feel myself bound for the same amount." R took possession of the house in 1835; and remained there until 1840; the rent of which was worth \$90 per annum. In an action brought upon the agreement of 1841, to recover the \$500, HELD: that the defendant was bound to return to the plaintiff the amount, if any, which the jury should find was paid by him to the defendant, under the con-

ASSUMPSIT—*Continued.*

- tract of 1835; that the value of the use and occupation was not to be deducted from such sum; and that the contract of 1841 was a repurchase. *Benson vs. Boteler*, 74.
2. Where the defendant made his note payable to the plaintiff, who passed it away for value, and afterwards, the plaintiff paid it, he may maintain an action for money paid for the defendant, though after the note fell due, and *before* the plaintiff had paid his endorsement, the defendant was released under the act for the relief of insolvent debtors. *Wharton et. al. vs. Callan*, 173.
 3. Upon the back of the notes of a corporation under its seal, payable to the order of *K*, he and *G*, endorsed their names, over which *D*, an assignee for value, wrote as follows: "For value received, we jointly and severally promise *D*, to pay him the amount of the within, should the *Company* make default in the payment thereof." On proof that the *Company* gave the notes in the course of their business, and *G*, their debtor, credit in account for their amount, demand of payment from, and refusal by the *Company*, and immediate notice to *G*, in an action of *assumpsit* by *D* against *C*, *HELD*, he was entitled to recover. *Gist and Scott vs. Drakely*, 330.
 4. The right of action was not on the sealed instrument, but on the endorsement, a collateral or distinct contract.
 5. For repairs made to a carriage for the benefit of the defendants, and with their knowledge and approbation, they would be liable; but whether so made, is a question for the jury. *Rogers & Marfield vs. Severson*, 335.
 6. In what character a person who takes a carriage to a mechanic to be repaired, is in possession, whether as driver, servant, agent, or owner, is a fact for the jury.
 7. On the 6th October 1841, *B* executed an absolute bill of sale to *M*, for a vessel, on which, on the 8th he took out a register in his own name, and made the usual oath required by the act of *Congress*. On the 15th November 1841, *B*, who continued in possession, chartered the vessel for a foreign voyage, to *H*, who appointed *C* master, and he, in November, and to the 15th December, purchased materials for her outfit, by *B*'s directions. On the 20th, the account for materials was delivered to *B*. On the 19th January 1842, the charter party made by *B*, was assigned and delivered by him to *M*, who then effected insurance on the vessel and freight, after an enquiry of *B*, of the nature and particulars of the voyage. Upon the return of the vessel, in August 1842, *M* received the freight, paid the port charges, for the first time took possession of her; in November sold her, and received the money; never having before had any possession and control of the vessel. In an action brought by a material man against *M*, for the supplies furnished as aforesaid, *HELD*:
 - 1st. That the plaintiffs were not entitled to recover, upon the mere finding of the fact by the jury, that *M* was the owner of the vessel, at the time the articles furnished her, were sold and delivered.

ASSUMPSIT—*Continued.*

Nor in addition to the fact of ownership, as aforesaid, the circumstances, that the supplies were furnished, and that *M* received the benefit of them.

2nd. That it was not competent for *M* to show, by parol proof, that his bill of sale was intended to be a mortgage; that it was so designed and agreed, between him and *B*.

3rd. It was not competent, to either plaintiff or defendant, under the circumstances of this case, by any form of prayer, to withdraw the question of *B*'s agency for *M*, in procuring materials for the ship, from the consideration of the jury. *Henderson vs. Mayhew*, 393.

8. Where there was evidence offered, that *M* was the owner of a vessel at the time she was furnished with supplies, but the account against her and her owner, was sent to *B*, her previous owner, for payment, this cannot discharge *M*, if, but for this proof, he would have been answerable. *Ib.*
9. Unless the vendor knows, at the time of sale of chattels, who his principal is, and notwithstanding such knowledge, makes the agent his debtor, the principal is not discharged. *Ib.*
10. The act of 1827, ch. 162, sec. 4, gives the *M. and C. C. of Baltimore*, the right to charge and collect wharfage from public wharves, and where the owner of a lot adjacent to such a wharf, demands and receives the wharfage, the city may recover the amount unlawfully received, and withheld from her, by such owner. *City of Baltimore vs. White*, 444,
11. The plaintiff proved, that on the 3rd March 1841, he sold and delivered to the defendant a quantity of merchandize, to the value of \$494.25, and there rested his cause. The defendant offered in evidence a bill of parcels, for the same merchandize, of the same date and amount, at six months, due 3-6 September 1841, on which was written by the plaintiffs: "Received payment for above as follows, *R*'s note, dated 16th December 1840, a 5 ms., due 16th May for \$484.79. Interest on amount of note from 16th May to 3rd September, \$8.55. Cash for balance, \$0.91." The plaintiff produced the note in court, and offered to deliver it up; and proved, that on the 4th May *R*. applied for a release under the insolvent laws. The note was in blank, and the defendant, at the time he passed it to plaintiff, refused to endorse it. There was evidence given, without exception, that the plaintiffs, after inquiry about *R*., at the request of the defendant, agreed to take the note at their own risk; that the defendant knew, before the time of his purchase, that *R*. did not pay his notes at maturity, and also evidence from which the jury might infer fraud on the part of the defendant. **HELD: 1st. &c.**
 - 2nd. That the receipt was evidence of payment, and the plaintiffs, upon the surrender of the note of *R*., were not necessarily entitled to a verdict.
 - 3rd. That the knowledge by the defendant, when he passed the

ASSUMPSIT—Continued.

note, that its maker was in a failing condition, did not, under the circumstances of the case, make the passing of the note a fraud upon the plaintiffs.

4th. That there was no evidence that the defendant concealed the information he had, in relation to *R.*, from the plaintiffs, at the time of passing away the note.

5th. That if the note of *R.* was received by the plaintiffs in payment, without recourse to the defendant, in the event of its being dishonored, then he is not entitled to recover, unless the jury shall find the transfer to have been fraudulently made.

6th. That if the sale was made upon a credit, not expired when the action was brought, then the plaintiffs are not entitled to recover in *assumpsit*, although the note was received but as collateral security, and not in payment. *Phelan & Bogue vs. Crosby*, 462.

BALTIMORE AND SUSQUEHANNA RAIL ROAD COMPANY.

See RAIL ROAD CORPORATIONS.

BALTIMORE, CITY OF *See* RIPARIAN PROPRIETOR.

BANKS. *See* TAXES, for tax on stock of.

BILL OF PARTICULARS. *SEE* PRACTICE, 34 to 37.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Upon negotiable paper, the holder can only write over the signature of the endorser, such an endorsement as conforms to the nature of the instrument, viz: to point out the person to whom the bill or note is to be paid. *Gist & Scott vs. Drakely*, 330.
2. In actions upon notes *not* negotiable, the intention of the parties is to be considered, and effect is to be given to that intention, if no rule of law is violated. *Ib.*
3. When a defendant, for a valuable consideration, agreed to become, and by endorsing a note or single bill, *not negotiable in point of law*, designed to become, security for the money expressed in it, he is responsible for its payment. *Ib.*
4. As to effect of a note received in payment of goods sold and delivered, *Phelan & Bogue vs. Crosby*, 462.

BOND.

1. The damages which an obligee in a replevin bond can recover from the obligors, are only such as he has suffered personally, by reason of the institution and failure of the action of replevin. *Walter use of Walter vs. Warfield*, 216.

See ESTOPPEL, 5.

BOND OF SHERIFF.

1. In an action on a sheriff's bond, conditioned for the faithful discharge of his duties, the defendant is liable to no more damages for an alleged escape under final process, than the plaintiff has actually sustained, to be ascertained by the verdict of a jury, and hence the

BOND OF SHERIFF—Continued.

sheriff and his sureties may show under such a breach, in mitigation of damages, the insolvency of the original defendant from the time of the issue of the ca. sa. until its return. *State, use of Creecy vs. Lawson et. al.*, 62.

2. The act of 1768, *ch. 10, sec. 1*, enables any plaintiff in an execution to call upon the sheriff to produce the body of the defendant before the court, and on his default, on motion, to cause judgment to be entered up for the full amount of his claim, principal, interest and costs. *Ib.*
3. Where such a course is adopted, in an action on the sheriff's bond, assigning as a breach the non-payment of such a judgment, that officer and his sureties would be liable for the full amount of the judgment. *Ib.*

BRITISH STATUTES.

1. The statutes of 13 Edw. 1, *ch. 11*, and 1 Rich. 2, *ch. 12*, first gave the action of debt against a gaoler or sheriff for an escape. *State, use of Creecy vs. Lawson*, 62.
2. Where the statutable remedy is pursued, the sheriff is put by the statute in the same situation in which the original debtor stood, and the jury cannot give a less sum than the creditor would have recovered against the defendant in the original suit. *Ib.*

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COLLECTORS OF COUNTY LEVIES AND TAXES.

1. By the act of 1825, *ch. 162, sec. 8*, the collector of the school tax is to be appointed by the taxable inhabitants of the district, and by the 11th section he is required to give bond, with security, to the satisfaction of the trustees, for the faithful discharge of his official duties. The election to be valid must be made by the taxable inhabitants. *Burgess vs. Pue*, 11.
2. The act of 1839, *ch. 90*, makes no change in the power of appointing such a collector. *Ib.*
3. A collector of taxes not selected by competent authority, although he gives bond for the discharge of his duties, has no legal warrant to act, and all his proceedings are tortious and unlawful. *Ib.*
4. In an action of *replevin*, brought by a taxable inhabitant against a collector of the school tax, to recover property seized for non-payment of such tax, due for 1843, having filed his affidavit on which he obtained the writ, affirming that the property had been unlawfully taken

COLLECTORS OF COUNTY LEVIES AND TAXES—*Continued.*

by such collector, he cannot maintain that the school district is disorganized, and the powers of the taxables suspended by reason of informalities in the proceedings of such district, for the year 1842.

Ib. 254.

5. Nor that the election for 1843 was void, because the minutes of the proceedings of the taxables did not state every thing to have been done, which the law requires to be done ; as, that the election should be by ballot. It is not necessary that the mode of election should appear on the minutes, nor that they should show the clerk had bonded. *Ib.*
6. In such an action, the collector need not offer proof of his qualification. He is an officer *de facto*, and in the absence of proof, no presumption is to be made against his qualification. *Ib.*
7. Persons acting publicly as officers of a corporation, are presumed to be rightfully in office. *Ib.*
8. An election by a corporation, contrary to its charter, is voidable ; yet if an officer has come in under color of right, and not in open contempt of all rights whatever, he is an officer *de facto*. *Ib.*
9. By the act of 1st April 1841, ch. 23, imposing a direct tax of twenty cents in the hundred dollars, it was designed, that such tax should be paid into the treasury, and the collector's commissions by the counties or cities respectively making the levy, by an additional levy, and not by the treasury. *Seidenstricker vs. State*, 374.

See TAXES.

COMPOSITION MONEY.

See LAND OFFICE, 3.

CONSTITUTIONAL LAW.

1. The legislature may delegate the power of taxation to the taxable inhabitants, for the purpose of raising a fund for the diffusion of knowledge and the support of primary schools, within their respective school districts. *Burgess vs. Pue*, 11.
2. Grants of similar powers to other bodies, for political purposes, have been coeval with the Constitution itself, and no serious doubts have ever been entertained of their validity. *Ib.*
3. The legislature have no power in any given determination of the Court of Appeals, to declare what would be the rights of the parties. That is a judicial power which the legislature does not possess. *Prout et. al. vs. Berry and wife*, 147.
4. Where the Court of Chancery, in 1838, directed certain parties to a cause, to pay their proportion of certain annuities, and the persons supposed to be aggrieved had lost their right of appeal by lapse of time, and in 1843 obtained an act, by which this court was authorised and required to take cognizance of, and hear and determine the said cause "in manner and to every effect as if such transcript had been in due time transmitted." *HELD*, that this court was bound to presume, that in compliance with the order of 1838, the appellees' proportion of the annuity had been paid, and could not

CONSTITUTIONAL LAW—*Continued.*

- determine the case in manner, and to every effect, as if the appeal had been taken in due time. *Ib.*
5. A legislative act authorising an appeal must either be capable of being complied with by the court, and the terms of the grant followed, or the act must be unconstitutional. *Ib.*
 6. The legislature may pass laws conferring on this court the right to hear appeals in special cases, after the time allowed by the general law had passed by; but such a law, to have efficacy, must leave the court untrammelled, as to the mode or manner of administering justice. *Ib.*
 7. The legislature had the right to delegate to those appointed to exercise them, viz: the taxable inhabitants, the powers given by the act of 1825, ch. 162. The individuals to whom those powers were delegated, ought to conform to the provisions of the law under which they act; but the minutes of their proceedings need not show all the facts necessary to give them jurisdiction. Governed by the nature of the trust conferred, and the great confidence reposed by the law in the judgment of such inhabitants, the court will presume any thing which the law requires to be done, to be rightly done, until the contrary appears. *Burgess vs. Pue*, 254.
 8. The collection of wharfage upon a public wharf, is a fit subject for State legislation. *City of Baltimore vs. White*, 444.
 9. All the property of banks, &c., the stock of which was assessed and taxed, being exempted from taxation, the taxation of their stock is constitutional. *State vs. Mayhew*, 487.
 10. The act of 1843, is a legitimate exercise of power, incident to the sovereign right of levying taxes for the support of government. *Ib.*
 11. The General Assembly has the right, by legislation, to impose upon all property within the State, a just and proportionately equal public tax; to provide all means, details necessary, for its speedy collection, by summary process of execution, or other reasonable or available means. *Ib.*
 12. A power exercised by the General Assembly, from the adoption of our Constitution till the present time, a period of nearly seventy years, ought to be deemed almost conclusive evidence of its possession by that body. *Ib.*
 13. A cotemporaneous construction of the constitution of such duration, continually practised under, and through which, many rights have been acquired, ought not to be shaken, but upon the ground of manifest error and cogent necessity. *Ib.*
 14. A citizen is not necessarily discharged from the obligation to perform a duty enjoined, by law, for the public good, because it imposes on him some additional labor, trouble and expense; as to perform militia duty, vote at the election of public officers, furnish true statements to assessors, obey the summons of executive officers, or arrest felons: in these, and other instances, the citizen must obey the law. *Ib.*

CONSTRUCTION.

See DEED.

INSURANCE, 4.

SHIPS AND SHIPPING, 5.

WILL AND TESTAMENT, 6, 9.

CONSTRUCTION OF ACTS OF ASSEMBLY.

1. By the act of 1834, ch. 336, (passed 21st March 1835,) any surety for the appearance of an insolvent petitioner is authorised to bring him into court, or before any judge thereof, as special bail may bring their principal into court, and when brought in, to surrender and commit him, provided that he be so surrendered before or at the first term to which suit shall be brought upon the bond for the appearance of such petitioner. **HELD:**
 - 1st. That such bonds are now assimilated to bail bonds.
 - 2nd. That the act applied to a bond executed on the 12th March 1835, the condition of which was not broken at the date of the passage of the act of 1834, ch. 336, and modified the remedy thereon. *State, use of Holton vs. Burk et al.*, 79.
2. The construction of a statute in every part of the State must be the same; a practice in a particular part of the State, inconsistent with its letter and spirit, cannot repeal it. *Walter et al. vs. Alexander and wife*, 204.

See CONSTITUTIONAL LAW, 4, 5, 6.

DOWER, 4, 5.

EXECUTOR AND ADMINISTRATOR, 5.

RAIL ROAD CORPORATIONS.

TAXES.

CONTINUANCE. See PRACTICE, 25, 26.

CONTRACT.

1. Upon a contract to sell a part of a tract of land called *G. Manor*, supposed to contain 988 1-2 acres, *more or less*, at the price of nine dollars per acre, the parties intended that the number of acres should be fixed by the contract, and not by subsequent measurement. Unless the words *more or less* lead to such a conclusion, they are useless and insensible; made in good faith, they qualify the representation of quantity. *Jones vs. Plater*, 125.
2. A contract must be interpreted by its terms. *Ib.*
3. When a tract of land is sold, supposed to contain 998 1-2 acres, *more or less*, the number of acres is not of the essence of the contract, and a deficiency of 55 acres in such a case, is not of such a character as to induce belief of fraud or mistake. *Ib.*
4. Parties to contracts are assumed to know the liabilities imposed on them by the law, and juries are not from evidence to infer, their ignorance of such liability. *Ib.*
5. Where a corporation executes a note which its charter does not authorise, the payee may, for value, stipulate with a third party that it shall

CONTRACT—*Continued.*

be paid, and will not then be permitted to urge the invalidity of the *Company* to make it. He was capable to bind himself to pay the debt, if it should not be paid at maturity. *Ib.*

6. Upon the single bill of *B*, dated 20th July 1827, promising to pay the "*heirs, administrators or assigns, of the estate of D, deceased,*" an action was commenced by the administrators of *D*, on the 8th February 1839. The writ was regularly renewed from term to term, until November term, 1839, when it was suggested, that the said letters of administration had been revoked and granted anew to *S*, who sued out another writ, in his own name, to the next succeeding term; which being returned *non est*, and regularly renewed for several terms, he then procured an attachment. This was levied and returned. The defendant, now, gave special bail and appeared, and the last administrator declared against him on the single bill, specially stating the revocation of the first letters. HELD: That it was uncertain, upon the face of these instruments, to whom they were to be delivered, or in whose name a suit must be brought; that no action could be brought on them; and, that limitations were a bar to the action. *Bennington vs. Dinsmore*, 348.

CORPORATIONS.

1. In the case of corporations, the recording of an official bond is not essential to its validity, unless it be so expressly declared. *Burgess vs. Pue*, 254.
- 2 A vote or resolution, appointing an agent for a corporation, need not be entered on the minutes, but may be inferred from the fact of accepting his services, or permitting him to act. *Ib.*
3. Persons acting publicly as officers of a corporation, are presumed to be rightfully in office. *Ib.*
4. An election by a corporation, contrary to its charter, is voidable; yet if an officer has come in under color of right, and not in open contempt of all rights whatever, he is an officer *de facto*. *Ib.*
5. The act of 1832, ch. 280, is not repealed by the act of 1834, ch. 89. The latter gives to the creditors of foreign corporations an additional remedy. *Georgia Ins. & Trust Co. vs. Dawson*, 365.

See RAIL ROAD CORPORATIONS.

TAXES, for Tax on Stock of.

COURT OF CHANCERY.

1. A bill dismissed under a rule for further proceedings, does not preclude the complainant from using any defence at law which he might otherwise have used. *Isaac and wife, lessee vs. Clarke*, 1.
2. Agents are not permitted to deal validly with their principals in any case, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition. *Brooke et. al. vs. Berry*, 83.
3. Circumstances in the conduct, action, and life of a grantor, stated and discussed, from which a court of equity will infer his mental

COURT OF CHANCERY—*Continued.*

imbecility, or, that undue influence had been exercised towards him by his general agent. *Ib.*

4. Where a general agent obtains from his principal a conveyance of lands at a price greatly below their value, this will, of itself, induce a court of equity to set aside the contract; unless it appeared to have been entered into, in a way and under circumstances, that there had been no abuse of confidence, no undue influence, no imposition, or material concealment practised by, the agent on his principal, which could cast a shade of doubt as to the fairness and honesty of the transaction. *Ib.*
5. In valid contracts between principal and agent, the parties should meet on equal terms; and the agent is bound to protect the interest of his principal, with the same care and circumspection, that he would his own; if he does not thus deal with his principal, his contracts with him are tainted with suspicion, and will be set aside. *Ib.*
6. Where a court of equity vacated a conveyance of land from a principal to his general agent, on the ground of constructive fraud, and of which land the grantee had possession, and decreed a sale of the premises, it also decreed an account between the parties, in which the grantee was to be charged with the rents and profits of the land, and credited for his improvements thereon, during the time he held and enjoyed the lands, under his alleged purchase; and with all sums by him *bona fide* paid, on account of his principal, or which should be justly due and owing from him to his agent. *Ib.*
7. Where a complainant alleged the existence of a contract with the defendant, accompanied with collateral circumstances, and called upon him not to state what the contract was, but to admit or deny the existence of the agreement and circumstances set forth; and the defendant, in his answer, averred another agreement between him and the complainant, and denied the collateral circumstances: the statement of the agreement by the defendant in such case is not *simply* responsive to the contract he was called on to admit or deny. It is not such a denial as requires two witnesses, or one with concurring circumstances to disprove it; nor in this case was it necessary to disprove the denial of the collateral circumstances by the same amount of proof. *Jones vs. Belt*, 106.
8. A defendant cannot exempt himself from the obligation to make a conveyance which he stipulated to make, on the ground that he has not the legal title. *Ib.*
9. A vendee, against whom a decree for specific performance of a contract of purchase is sought, may object the want of title in his vendor, as insuperable in ordinary cases. *Ib.*
10. Ordinarily Chancery will not compel a purchaser to pay the purchase money and accept a defective title. But a vendor has no interest in setting up his own want of title. *Ib.*

COURT OF CHANCERY—*Continued.*

11. A decree which refers to the bill for a description of the lands on which it is intended to operate, is not vague and uncertain in that respect. *Ib.*
12. A sheriff who has made a levy upon personal property, under a writ of *feri facias*, in good faith apprehending danger of loss by reason of the conflicting claims made upon it, is entitled to have the title of the claimant settled in equity, and be protected in the mean while by injunction. *Ridenour et al. vs. Keller*, 134.
13. The accounts of an administratrix, making a distribution of her intestate's estate in money, no creditor nor fraud appearing, will not, after a lapse of sixteen years, be disturbed in equity, where she was guardian to her infant children, and paid them the interest on the sum distributed to them during her life, and her successor in the guardianship received the amount distributed, from her personal representative, though she had taken to her own account, certain portions of her intestate's estate at their appraised value, which portions remained in *esse* at the time of her death. *Ib.*
14. The court will presume that distribution of an intestate's estate, had, after a lapse of four years, been made, where creditors were not interested; no charge of fraud made; and it appearing that, all the distributees had received their proportions of the appraised value of the estate in money, and some of them had disposed of the same. *Ib.*
15. Where an administratrix took a portion of her intestate's estate, to her own account, at the appraisement, and paid the distributees their portions of the estate in money, which they kept for four years, and alleged no fraud; the distributees, seeking to set aside her settlements, must first do equity, and return what they have received, or offer so to do. *Ib.*
16. Where the Court of Chancery, in 1838, directed certain parties to a cause, to pay their proportion of certain annuities, and the persons supposed to be aggrieved had lost their right of appeal by lapse of time, and in 1843 obtained an act, by which this court was authorised and required to take cognizance of, and hear and determine the said cause "in manner and to every effect as if such transcript had been in due time transmitted." **HELD**, that this court was bound to presume, that in compliance with the order of 1838, the appellees' proportion of the annuity had been paid, and could not determine the case in manner, and to every effect, as if the appeal had been taken in due time. *Prout et al. vs. Berry*, 147.
17. M, by his last will, devised to one of his three sisters, certain real estate in fee, and constituted her his residuary legatee, and devisee; he bequeathed to her all his "money, choses in action, and all the rest, residue, and remainder of my (his) property, real, personal and mixed, (not hitherto devised or bequeathed,) of which I am now possessed, or of which I may be possessed, at the time of my death, to her, her heirs and assigns, forever." M also devised real and personal estate, in trust, for his other two sisters. After the publication of

COURT OF CHANCERY—*Continued.*

- this will, the testator purchased other real estate, and died without republishing it. *HELD*, that the two sisters, who took trust estates, could not also claim as heirs at law, their proportion of the after-acquired estate; which, in this case the testator intended to pass under the residuary clause. *McElfresh adm'r vs. Schley and Barr*, 181.
18. No person will be compelled to make an election unless the intention of the testator be sufficiently made out. There never can be a case of implied election, but upon a presumed intention of the testator. *Ib.*
 19. The degree of intention necessary to raising a case of election, must plainly appear on the face of the will. *Ib.*
 20. Where a testator declares in express terms his design to make T. his residuary devisee, and explicitly announces of what, by devising to her the remainder of the property of which he was *then* possessed, or of which he might be possessed, *at the time of his death*; this is evidence of his intention to devise all the estate of which he might die possessed; and upon the equitable principles of election, is a devise to that extent. *Ib.*
 21. The doctrine of equitable election is as applicable to an heir at law, as to other devisees; and may result, either from an express, or an implied condition. *Ib.*
 22. A man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument; if he claims an interest under it, he must give full effect to it, as far as he is able. He cannot take what is devised to him, and at the same time, what is devised to another; hence, he must elect which he will take of the two devises. *Ib.*
 23. The rule, that a will is inoperative to pass lands acquired after its execution, will not prevent the application of the doctrine of election. *Ib.*
 24. Void wills, as of *femes covert*, or infants, do not demand an election; so a will not executed according to the statute of frauds, creates no case of election, from implication. Such wills cannot be read as evidence. *Ib.*
 25. The modern *English* cases do not enlarge the principle of election. *Ib.*
 26. The court will fix a time, in their decree, within which a devisee bound to elect, must make an election; and if the election is *not* to take the estate in fact used and enjoyed under the will, the court will further decree an account of rents and profits of the part so held and used. *Ib.*
 27. An equitable title to vacant lands, will, in equity, prevail against a legal title, when the party possessed of the legal title, has procured it by means of fraudulent representations to the officers of the land office. Upon a bill, in such case, the patent will be vacated in favor of the equitable title, or the patentee decreed to convey the land to the injured party. *Hoye vs. Johnston*, 291.

COURT OF CHANCERY—*Continued.*

28. *P* sold a tract of land to *T* for \$8000; of which, \$1000 was secured by the vendee's notes; \$2000, due in 1841 and 1842, secured by the vendee's notes with *W*, as endorser; and the balance of \$5000, due from 1843 to 1847, secured by the vendee's notes with *D* and *S* as endorsers. The vendee died insolvent. The vendor recovered judgment, at law, against *W*, and then proceeded in equity to sell the land, which he purchased in at \$4000. Upon a bill, filed by *W* to compel *P* to apply the \$4000 in discharge of the notes *first* due, and to *restrain* his proceedings at law upon his judgments, HELD: that the product of the sale should be so applied, under the direction of the Court of Chancery, as would give full security to the vendor, which might be done by enquiring into the pecuniary condition of the sureties. *Welch vs. Parran et al* 320.
29. If any one of the sureties should be found unable to pay, then the vendor should be secured by applying so much of the proceeds of sale, as would extinguish the note thus endangered. *Ib.*
30. The vendor is entitled to full payment from the one security or the other; or if one is insufficient, from the additional security. The endorsed notes are to be considered as additional securities. *Ib.*
31. The vendor is not bound to wait, during the time occupied in ascertaining the condition of the securities, but as the notes become due may enforce them at law. *Ib.*
32. Such of the sureties as pay, may be subrogated to the rights of the vendor, to the extent of any interest they may have in the purchase money. *Ib.*
33. Where a will devising real property authorized its sale upon the consent of the testator's widow, her consent, to a decree for the sale, is a sufficient compliance with the requisition of the will. *Tyson vs. Mickle et al.*, 376.
34. Improvement in price, arising from a general enhancement in value since the sale, is no ground for setting aside a sale made under a decree. *Ib.*
35. The ratification or rejection of a sale, must depend on the state of circumstances existing at its date, not on subsequent contingencies; depreciation of property is at the risk of the purchaser, and he must reap the fruits of appreciation. *Ib.*
36. A judgment creditor issued a *fi. fa.*, and sold the land of his debtor. The sheriff, without his consent, gave time to the purchaser to pay for the land, and the purchase money not being all paid, the creditor ordered the sheriff to proceed to a re-sale of the property levied on. The debtor is not entitled to an injunction to stay such re-sale. *Hardesty vs. Wilson*, 481.
37. In a proceeding in equity where the sheriff is no party, the conduct of that officer cannot be inquired into. *Ib.*

See DOWER.

EVIDENCE, 15 to 20.

FRAUD, 3.

PRACTICE IN CHANCERY.

TRUSTS—TRUSTEES.

DAMAGES.

See ACTION UPON THE CASE, 1, 2, 3, 4.

BOND, 1.

EXECUTION, 10, 11, 12, 13, 14.

JUDGMENT, 1.

REPLEVIN, 12.

DEBT.

1. An action of debt cannot be maintained upon a deed of mortgage, reciting that the grantee was indebted to the grantor in a sum certain, and that the deed was executed for the better securing the payment thereof, with a proviso, after the *habendum* of the instrument, that upon payment of the money the deed should be void, there being no covenant in the deed to pay the debt. *Barrell vs. Glover et. al.*, 171.

DECREE. See COURT OF CHANCERY, 11.

EVIDENCE, 45, 46, for effect of, collaterally.

DEED.

1. The court cannot say that a description in a deed for land is too vague, and the deed void for uncertainty, when the vagueness and uncertainty are not obvious from an inspection of the instrument. *Isaac and wife's lessee vs. Clarke*, 1.
2. A deed capable of a certain location is sufficiently certain in the description to pass title. *Ib.*
3. The act of 1729, ch. 8, sec. 5, requires that a deed for personal property, when the grantor remains in possession, shall be acknowledged before one justice of the county, where the grantor resides. Where the acknowledgement omitted to state the official character of the officer before whom it was made, it may be proved by the admissions of the parties. *Dyer vs. Etnyre and Besore*, 150.
4. That act prescribes no form of acknowledgment; it does not require the authority of the justice to take it, to appear on the face of his certificate, nor is it necessary to state that the justice was a resident of the county where he acted. *Ib.*
5. Where the justice, taking the acknowledgment of a deed under the act of 1729, ch. 8, sec. 5, does *not reside* in the county where it was taken, the instrument is as inoperative, as if the person taking the acknowledgment were not a justice. *Ib.*
6. If an acknowledgment contrary to the fact, state the residence of the party to be in a different county from that of the justice, the error may be proved, and the instrument established under the act of 1729. *Ib.*
7. A false statement in the certificate of the justice may be disproved, and an instrument thus invalidated. *Ib.*
8. The case of *Conelly vs. Bowie*, 6 *Harr. and John*. 141, cited and explained. *Ib.*
9. Under the act of 1729, ch. 8, sec. 5, the recording of a bill of sale of personal property within *twenty days*, in the records of the same county, is as necessary to its validity, as is its acknowledgment. *Ib.*

DEED—Continued.

10. Void for want of recording, cannot operate as a covenant. *Ib.*

See ESTOPPEL, 1, 2, 3, 4.

VOID, 1.

DELIVERY. *See* EVIDENCE, as to, of growing crops, 28.

DISTRESS. *See* LANDLORD AND TENANT.

DOWER.

1. By the act of 1818, ch. 193, sec. 10, it is enacted: "that widows shall be entitled to dower in lands held by equitable title in the husband, unless the same be devised by a will, made before the passage of this act: but such right of dower shall not operate to the prejudice of any claim for the purchase money of such lands, or other lien on the same; and tenants by the courtesy, shall be entitled for life to lands held by equitable title, but not to the prejudice of any claim for the purchase money of such lands, or other lien on the same."—HELD: That the owner of the equity of redemption in fee, having mortgaged the same, prior to the passage of this act, and the same having been sold under a decree obtained upon such mortgage, his widow was not entitled to dower, as against the purchaser at such sale. *Hopkins et al. vs. Frey*, 359.
2. If the equity of redemption had not been mortgaged prior to the act of 1818, her right to dower thereout, could not be questioned. *Ib.*
3. There is nothing in the act of 1818 which authorises the opinion, that an equitable estate which had belonged to the husband, but had been mortgaged before the passage of that law, and sold in his life time, is an estate of which his widow could be endowed. *Ib.*
devised by will made before its passage, and cannot operate to the pre-
4. The act refuses dower in an equitable interest in lands, if the same be judice but of those creditors and heirs, who became such after its enactment. *Ib.*

EDUCATION. *See* PRIMARY SCHOOLS.

EJECTMENT.

1. A plaintiff in ejectment cannot offer in evidence a record of the proceedings upon the bill of the defendant in Chancery against him, which bill had been dismissed for want of due prosecution upon the motion of the plaintiff, for the purpose of precluding the defendant from questioning the plaintiff's title at law, though the object of the bill was to vacate such title. *Isaac and wife's lessee vs. Clarke*, 1.
2. A bill dismissed under a rule for further proceedings, does not preclude the complainant from using any defence at law which he might otherwise have used. *Ib.*
3. The general rule is, that a party consenting to hold as lessee, cannot afterwards deny the title of his acknowledged landlord. *Ib.*
4. There are exceptions to this rule; but they do not rest on the fact, that the acknowledgment was made by the tenant subsequent to his coming into possession, or that he originally had possession under another title. *Ib.*

EJECTMENT—*Continued.*

5. The circumstances of deception, mistake, or other grounds, which exempt a tenant from the influence of the rule, apply as well to the case of admissions after his possession commenced, as before. *Ib.*
6. Where a party is in possession, and enters into an agreement with another claiming the land, to become his tenant, he is within the general rule, which forbids the tenant from questioning the landlord's title. A relation thus created does not, *per se*, constitute one of the exceptions to that rule. *Ib.*
7. The court cannot say that a description in a deed for land is too vague, and the deed void for uncertainty, when the vagueness and uncertainty are not obvious from an inspection of the instrument. *Ib.*
8. A deed capable of a certain location is sufficiently certain in the description to pass title. *Ib.*
9. To make a judgment by default, a bar to a lease under the statute of 4 Geo. 2, the record must disclose such facts and circumstances, as will justify the court in believing, or assuming, that in rendering its judgment, the court below designed to exercise the authority conferred on it by that statute. *Walter et al. vs. Alexander and wife*, 204.
10. When all the proceedings in ejectment, until long after the judgment by default, show it to have been an ordinary case of ejectment, having no connexion with the statute, there is nothing to warrant the assumption, that the judgment was rendered under the authority of the statute. *Ib.*
11. Where the affidavit required by the statute was filed in vacation, at a different term from that of the judgment, and more than ten months after its rendition; and which, according to the proof, was never shown to the county court, this court will not assume the judgment was given on the affidavit, according to the obvious import and design of the statute. *Ib.*
12. The affidavit in such cases, should be filed before the judgment by default is entered, or some time during the term at which it was rendered; so that before the judgment became absolute, the court may have had an opportunity of inspecting and adopting the affidavit, as the basis of its judgment. *Ib.*
13. The court will not presume, that an affidavit was filed, pursuant to the statute, after a lapse of seventeen years, where it clearly appears, that in fact it was not so filed; yet if filed in time, the court will be presumed to have discharged their duty in relation to it. *Ib.*
14. The variation of the compass, and the degree of it, are questions of fact, and upon evidence affecting the degree of variation, it is not for the court to say, that the evidence offered by one party, is better than that offered by the other, to guide the jury in determining whether any, or what allowance shall be made for such variation. *Harlan vs. Brown*, 475.

See LANDLORD AND TENANT.

PRACTICE, 20, 21.

RIPARIAN PROPRIETOR,

ELECTION IN EQUITY.

1. No person will be compelled to make an election unless the intention of the testator be sufficiently made out. There never can be a case of implied election, but upon a presumed intention of the testator. *McElfresh adm'r vs. Schley and Barr*, 181.
2. The degree of intention necessary to raising a case of election, must plainly appear on the face of the will. *Ib.*
3. Where a testator declares in express terms his design to make T his residuary devisee, and explicitly announces of what, by devising to her the remainder of the property of which he was *then* possessed, or of which he might be possessed, *at the time of his death*; this is evidence of his intention to devise all the estate of which he might die possessed; and upon the equitable principles of election, is a devise to that extent. *Ib.*
4. The doctrine of equitable election is as applicable to an heir at law, as to other devisees; and may result, either from an express, or an implied condition. *Ib.*
5. A man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument; if he claims an interest under it, he must give full effect to it, as far as he is able. He cannot take what is devised to him, and at the same time, what is devised to another; hence, he must elect which he will take of the two devises. *Ib.*
6. The rule, that a will is inoperative to pass lands acquired after its execution, will not prevent the application of the doctrine of election. *Ib.*
7. Void wills, as of *femes covert*, or infants, do not demand an election; so a will not executed according to the statute of frauds, creates no case of election, from implication. Such wills cannot be read as evidence. *Ib.*
8. The modern *English* cases do not enlarge the principle of election. *Ib.*

ENROLMENT.

1. A prominent object of our enrolment laws is the protection of purchasers. *Addison vs. Hack*, 221.
2. A grant, not acknowledged, nor recorded, of a power to divert the course of a stream, which flowed through the grantor's land, but which power *had not been executed*, would not be a bar to a subsequent *bona fide* purchaser, for a valuable consideration, without notice, claiming the water right naturally incident to the lands he had purchased. To interpose such a bar, in such a case, the same conformity to the registry laws is necessary, as if land were the subject of the grant. *Ib.*
3. The permission granted by the *Mayor and City Council of Baltimore*, to extend an improvement into the water, to an owner of a lot adjacent thereto, is not within our registration system. *City of Baltimore vs. White*, 444.

ENROLMENT—*Continued.*

4. That system sanctions no conveyance of, or incumbrance upon real property, created by matter in *pais*, or resting in *parol*. *Ib.*

See CORPORATION, 2.

DEED, as to Chattels, 9.

EQUITY OF REDEMPTION. See DOWER.

ESCAPE. See EXECUTION.

ESTOPPEL.

1. Where a defendant obtained an absolute bill of sale for a vessel, authorizing the community to regard him as the owner thereof, he cannot for his benefit, be permitted to allege in an action against him, by a stranger to the instrument, that it is a mortgage. *Henderson vs. Mayhew*, 393.
2. Oral proof is inadmissible, to change or contradict the terms of a written instrument. *Ib.*
3. Strangers to an instrument, when authorised to impeach or contradict it, may offer *parol* testimony for that purpose; and so a grantor may in a controversy with a grantee, if he charges the same to have been obtained by fraud or mistake. *Ib.*
4. Parties to a written instrument are not permitted, in controversies with strangers, to insist, that it does not express what it was intended to express. *Ib.*
5. In an action on a bond given by a trustee, appointed under a decree in equity, "well and truly to execute the trust reposed in him by the said decree, or which shall be reposed in him by any future decree or order in the premises," brought for the use of a party, to whom a portion of the proceeds of the property sold by such trustee had been ordered to be paid, to recover the same, it is not competent for such trustee to question the correctness of the original decree for a sale; or the order relative to the distribution of the purchase money. *Richardson vs. the State, use of Rawlings*, 439.
6. Where an ordinance was passed, granting permission to build a wharf, which required the written assent of the applicant for such permission, and it appeared that he erected the wharf, the law will presume such written assent, and the grantor, and his subsequent assignees, will be estopped from denying such assent. *City of Baltimore vs. White*, 444.

See CONTRACT, 5.

LANDLORD AND TENANT, 1, 2, 3, 4.

EVIDENCE.

1. A plaintiff in ejectment cannot offer in evidence a record of the proceedings upon the bill of the defendant in Chancery against him, which bill had been dismissed for want of due prosecution upon the motion of the plaintiff, for the purpose of precluding the defendant from questioning the plaintiff's title at law, though the object of the bill was to vacate such title. *Isaac and wife's lessee vs. Clarke*, 1.
2. A bill dismissed under a rule for further proceedings, does not preclude the complainant from using any defence at law which he might otherwise have used. *Ib.*

EVIDENCE—*Continued.*

3. In an action brought by the owner of a fee against a company for having, after the construction of their road through his land, (the benefits of which construction to the plaintiff had been submitted to jurors upon an inquisition to condemn the land,) abandoned the same, and constructed the road anew in another location, off the plaintiff's land, the plaintiff cannot give evidence of the damage which would accrue to him from such original construction independent of the inquisition. *B. & S. Rail Road Co. vs. Compton et. al.*, 20.
4. In an action on a testamentary bond, the equitable plaintiff claimed under a residuary clause in the will of *H*, executed in 1838, and admitted to probat in the same year, one-third of the residue of the testator's personal estate of which he might die possessed. Upon an issue denying the facts of the replication, the defendant gave in evidence an indenture made by the testator in the year 1832, conveying to his executor, the defendant, one-half of all his personal property of which he might die possessed, and which had also been admitted to probat by the orphans court as a testamentary paper of *H*. HELD: that the indenture was evidence, material, competent, and necessary to the finding of a proper verdict on the matters in controversy, as a part of the will of *H*. *Hannon et. al. vs. the State, use of Robey and wife*, 42.
5. When the orphans court admits two papers of different dates to probat as testamentary instruments of the same party, and holds that one is not a revocation of the other, this court will presume that the orphans court acted correctly, and not disturb their judgment when such papers are incidentally offered in evidence. *Ib.*
6. The orphans court may receive evidence of an error in the date of a will offered for probat. *Ib.*
7. In an action on a sheriff's bond, for an alleged permissive escape by the sheriff of a party arrested on a *ca. sa.*, which that officer had returned *cepi*, the plaintiff may show that such return is untrue in point of fact, and that the sheriff had not the body of the defendant in court, at the return day of the writ, ready to be delivered up on the demand of the plaintiff. *State use of Creecy vs. Lawson et al.*, 62.
8. After an arrest under a *ca. sa.*, and a permissive escape before the return day has been proved, the burthen of showing, that the sheriff had the body of the defendant in court, according to the exigencies of the writ and his return of *cepi* thereto, is upon the sheriff. *Ib.*
9. In an action on the case at common law against the sheriff for an escape, he may offer evidence in mitigation of damages. The amount recovered against the party arrested, is not conclusive on that question. *Ib.*
10. The sheriff's return is *prima facie* evidence of the truth of the facts which it discloses. *Ib.*
11. The possession by the plaintiff of a paper signed by the defendant, and on which the former had brought an action at law, is sufficient evi-

EVIDENCE—*Continued*,

- dence from which the jury might find it to be the agreement of the parties. *Benson vs. Boteler*, 74.
12. Where a deed to a party is impeached as fraudulent, he cannot offer evidence of his good character and general upright conduct, in support of such deed. *Brooke et. al. vs. Berry*, 83.
 13. The feeble intellect of a grantor; the relation of principal and general agent between him and the grantee; inadequacy of price for land conveyed by such a grantor to such a grantee; are all circumstances calculated to impeach a deed, as constructively fraudulent. *Ib.*
 14. Where there is great contrariety of evidence as to the feebleness of a grantor's intellect, as twelve witnesses for it and nine against it, the admission of his grantee, his general agent, that such grantor was incapable of transacting his own business, will corroborate the affirmative of that issue. *Ib.*
 15. Such evidence is sufficient to control a defendant's answer, denying the fact of mental incapacity. *Ib.*
 16. The effect of the averages of witnesses as to value of lands and rents, stated and discussed. *Ib.*
 17. The value of land ascertained by considering its annual rents, as equal to five *per centum* on such value. *Ib.*
 18. It is a general rule, that a positive denial, in an answer of the contract stated in the bill, should be contradicted or outweighed by the proof of two witnesses, or one witness and pregnant circumstances; but the principle on which it is predicated is not one of universal application. *Jones vs. Belt*, 106.
 19. As where two papers were exhibited in the cause, admitted in the defendant's answer, and declared by the court to be the agreement of the parties, they are sufficient to control the answer denying the agreement, without the aid of any oral testimony in their support. *Ib.*
 20. The cases to which the rule was introduced to apply, must be those in which the facts denied depended on oral testimony; or oral and circumstantial evidence; not where they were conclusively proved by the production of the written contract of the parties. *Ib.*
 21. Neither are the exceptions to the rule confined to cases, where the contract denied, has been formally signed and executed; as where a verbal contract is made, to which no witness could testify, and a complainant, charging and seeking its performance, were to exhibit with his bill various letters written by the defendant to third parties, stating the contract, all which letters, the answer denying the contract, admitted to be genuine; this would dispense with the general rule in question. *Ib.*
 22. Where a plaintiff contracts with the defendant's agent, in an action on the contract, it is necessary to give proof that the agent had some authority. *Tiffany vs. Savage*, 129.

EVIDENCE—*Continued.*

23. Where the bill of exceptions contains no evidence of the recording of a bill of sale, the usual certificate thereof by the county clerk, not appearing by the record to have been indorsed on the bill of sale, it is not admissible in evidence in an action at law between the creditors of the grantor, and a defendant claiming to rely on the grantor's title. *Byer vs. Etnyre and Besore*, 150.
24. The statement "at the request of Z.," (the grantor) "the following bill of sale was recorded," not signed by any person, preceding a bill of sale in a bill of exceptions, where the admissibility of the same as evidence was objected to, is no proof of the recording of such instrument. *Ib.*
25. Where permission was given by a tenant to his landlord to sell grain growing in the ground, for his own use, on the premises, and in view of the grain, and the landlord proceeded to advertise such grain for sale, whether such facts amounted to a delivery of the grain, is a question dependent upon the intention of the parties, to be passed on by the jury. *Ib.*
26. The county court ought not to be called upon, to submit to the finding of the jury, a fact, of which there was no testimony. *Walter et. al. vs. Alexander and wife*, 204.
27. A party purchased the reversion in fee of a lot, described as subject to a ground rent, the deed for the reversion being for less ground than the original lease. Afterwards, the rent not being paid, the purchaser of the reversion, brought his action of ejectment to recover possession; declared according to the lease, and recovered judgment by default, and possession. Some years after, the lessee brought another action for the premises described in the lease. **HELD:** that the recovery in the first action, being for more land than the plaintiff was entitled to, was no evidence that the whole reversion of the leased premises had been conveyed to the plaintiff in that action. *Ib.*
28. *D* sued out a writ of *replevin*, and gave the usual bond, with the other defendants as his sureties, to *J*; at the trial of the *replevin*, the defendant *J* pleaded *non cepit*, and property in *S*; and the plaintiff, *D*, pleaded property in himself. The issues were found for *J*, with a judgment for a return of property. In an action on the *replevin* bond, entered for the use of *S*, the defendants, *D* and his sureties, were permitted to prove in mitigation of damages, that the property really belonged to *S*, that *J* had no personal interest in it; and maintain, that he could recover in this action only the amount of damage sustained by him, personally, in consequence of the property being taken from his possession, and could not increase the damages to the extent of *S*'s right, by showing that he was her agent. *Walter use of Walter vs. Warfield et al.*, 216.
29. In an action relating to lands, if the defendant does not take defence on warrant, the plaintiff is under no obligation to ask for a warrant to locate his land, or any of the matters in controversy between the parties. *Addison vs. Hack*, 221.

EVIDENCE—*Continued*,

30. In such case, without plots, he may read his title papers in evidence ; prove his possessions under them ; and show by oral, and other testimony, the injury he complains of, and for which he seeks indemnity. *Ib.*
31. In an action for damages, for diverting the course of a stream from its natural channel on the plaintiff's land, the defendant may show, that the diversion was made on his lands above those of the plaintiff, and that it was rather a benefit, than an injury to the plaintiff ; or that it was made in virtue of a verbal agreement between plaintiff and defendant, that the latter might make the diversion, for the purpose of working a mill to be erected by the defendant on his own land, if the defendant would allow the plaintiff the use of a road through the defendant's land, and the execution of such agreement ; or that the plaintiff entered into such a contract with the defendant, conferring the privilege, with a fraudulent design, and for the purpose, of extorting money from him. *Ib.*
32. Such evidence is admissible in mitigation of damages ; and for the purpose of showing that the defendant was not a trespasser, *ab initio*, for continuing the diversion after a countermand of his authority by the plaintiff ; or that he could not be made responsible in damages for acts done upon his own land, with the verbal permission and authority of the plaintiff. *Ib.*
33. A vote or resolution, appointing an agent for a corporation, need not be entered on the minutes, but may be inferred from the fact of accepting his services, or permitting him to act. *Burgess vs. Pue*, 254.
34. In an action to recover for repairs done to a carriage in June 1837, the plaintiff offered an absolute bill of sale of it, from *M* to the defendants, dated July 1836. The defendants, for the purpose of showing that the bill of sale to them was designed to be a mortgage, or a conditional sale, and to rebut the inference, that *M*, who continued to be the driver of the carriage, and took it to the shop of the plaintiff, was their agent, proposed to offer in proof, entries in their *Blotter*, *Ledger*, and *account books*, in relation to the transactions between them and *M* ; HELD inadmissible to modify the bill of sale, and insufficient to rebut an agency in 1837. *Rogers and Marfield vs. Severson*, 385.
35. Various circumstances in relation to the possession and ownership of a carriage sent to a mechanic for repairs stated and considered, making a case for the exclusive consideration of the jury, whether the repairs were made by the authority of the defendants. *Ib.*
36. It is not competent to show, by parol proof, that a bill of sale was intended to be a mortgage ; that it was so designed and agreed, between the grantor and grantee. *Henderson vs. Mayhew*, 393.
37. The jury are exclusive judges of the weight of parol evidence offered to them, tending to prove an agency. *Ib.*
38. Oral proof is inadmissible, to change or contradict the terms of a written instrument. *Ib.*

EVIDENCE—*Continued.*

39. Strangers to an instrument, when authorised to impeach or contradict it, may offer parol testimony for that purpose; and so a grantor may in a controversy with a grantee, if he charges the same to have been obtained by fraud or mistake. *Ib.*
40. Parties to a written instrument are not permitted, in controversies with strangers, to insist, that it does not express what it was intended to express. *Ib.*
41. The recital in a mortgage executed and delivered by *R* to *G*, that he stands indebted to *G* in a large sum of money, for advances, the amount of which is to be ascertained upon examination of their accounts by *J* and *M*, mutually appointed by *R* and *G*, for that purpose, is a reference of a mere matter of calculation, and ascertainment as to the amount of money advanced; an ascertainment in conformity to such recital does not merge the original contract. *Randall vs. Glenn*, 430.
42. An ascertainment of the amount due, under such circumstances, is competent evidence, in an action of debt brought by *G* against *R*, for money lent, advanced, had, and received, under the plea of *nil debet*, as an admission of the defendant of the amount due the plaintiff. *Ib.*
43. In an action on a bond given by a trustee, appointed under a decree in equity, "well and truly to execute the trust reposed in him by the said decree, or which shall be reposed in him by any future decree or order in the premises," brought for the use of a party, to whom a portion of the proceeds of the property sold by such trustee had been ordered to be paid, to recover the same, it is not competent for such trustee to question the correctness of the original decree for a sale; or the order relative to the distribution of the purchase money. *Richardson vs. the State, use of Rawlings*, 439.
44. If there was any error in the proceedings in Chancery, of which the trustee had any right to complain, he might have appealed therefrom. *Ib.*
45. The means by which a wharf is erected, under the act of 1745, in the city of *Baltimore*, and appropriated to the public use, form a part of the paper title, the record evidence, which must be resorted to, and examined, to trace the right to such property; no patent issues, but the title must conform to the acts of 1745, ch. 9; 1783, ch. 24; 1796, ch. 68; and the ordinances of that city. *City of Baltimore vs. White*, 445.
46. The law imputes to a purchaser knowledge of all facts, appearing at the time of his purchase upon the paper or record evidence of title, which it was necessary for him to inspect to ascertain its sufficiency. *Ib.*
47. So the purchaser of a wharf in the city of *Baltimore*, erected under the authority of the acts of 1745, 1783, and 1796, though *bona fide*, is affected with notice of the permission granted to build it, and bound by it. *Ib.*
48. A receipt for a promissory note, on account of merchandize sold, is evidence of payment. *Phelan and Bogue vs. Crosby*, 462.

EVIDENCE—Continued.

49. Where a will authorized an executor to sell the residue of the testator's real and personal estate within two years from his decease, a sale made within the two years is valid, though the conveyance to the purchaser was not executed until after that period, and parol evidence is admissible to show the time of sale. *Harlan vs. Brown*, 475.
50. It is for the court to decide on the admissibility of evidence, but the comparative value, or weight of testimony, is for the consideration of the jury. *Ib.*
51. The variation of the compass, and the degree of it, are questions of fact, and upon evidence affecting the degree of variation, it is not for the court to say, that the evidence offered by one party, is better than that offered by the other, to guide the jury in determining whether any, or what allowance shall be made for such variation. *Ib.*

See DEED 7.

PRACTICE.

EXECUTION.

1. The courts of *Maryland* have, for a long period, sanctioned the abbreviated form of a return, *cepi*, by the sheriff, to the writ of *capias ad satisfaciendum*. *State, use of Creecy vs. Lawson et. al.*, 62.
2. Such a return is in legal effect, a declaration by the sheriff on oath, that by virtue of the writ, he had taken the body of the defendant, and him had ready to produce before the court, at the time and place, as commanded by such writ. *Ib.*
3. The sheriff's return is *prima facie* evidence of the truth of the facts which it discloses. *Ib.*
4. In this State, anterior to the act of 1811 *ch.* 161, *sec.* 2, if the sheriff made an arrest under a *capias* on final process, and suffered the party arrested to escape, he could not again arrest the same party, on the same process, without rendering himself obnoxious to an action of trespass for false imprisonment. *Ib.*
5. This disability was removed by that act, and the power conferred on the sheriff to make a second arrest, of the same party, by virtue of the same process. But it did not protect the sheriff against the demand of the plaintiff in the process for an escape. *Ib.*
6. The act of 1828, *ch.* 50, *sec.* 2, declared that if the sheriff produced the body of the defendant at the return day of the writ, he should not be liable for any intermediate escape. This act is not confined to arrests on *mesne* process, but applies to *final* process, *attachment* as well as *capias*. *Ib.*
7. Before the act of 1828, the sheriff on *mesne* process was authorised to arrest the defendant a second time; and the reason and policy of the law was by it extended to arrests on *final* process. *Ib.*
8. Where a sheriff arrests the defendant on *final* process, and has him ready to be delivered up at the return day of the writ, on the demand of the plaintiff, this in law is a performance of his duty. *Ib.*

EXECUTION—*Continued.*

9. The statutes of 13 Edw. 1, ch. 11, and 1 Rich. 2, ch. 12, first gave the action of debt against a gaoler or sheriff for an escape. *Ib.*
10. Where the statutable remedy is pursued, the sheriff is put by the statute in the same situation in which the original debtor stood, and the jury cannot give a less sum than the creditor would have recovered against the defendant in the original suit. *Ib.*
11. The action on the sheriff's bond to recover damages for an escape, is neither the common law action on the case, nor the remedy granted by the statutes of *Edward* and *Richard*. *Ib.*
12. In an action on a sheriff's bond, conditioned for the faithful discharge of his duties, the defendant is liable to no more damages for an alleged escape under final process, than the plaintiff has actually sustained, to be ascertained by the verdict of a jury, and hence the sheriff and his sureties may show under such a breach, in mitigation of damages, the insolvency of the original defendant from the time of the issue of the *ca. sa.* until its return. *Ib.*
13. The act of 1768, *ch. 10, sec. 1*, enables any plaintiff in an execution to call upon the sheriff to produce the body of the defendant before the court, and on his default, on motion, to cause judgment to be entered up for the full amount of his claim, principal, interest and costs. *Ib.*
14. Where such a course is adopted, in an action on the sheriff's bond, assigning as a breach the non-payment of such a judgment, that officer and his sureties would be liable for the full amount of the judgment. *Ib.*
15. The act of 1768, *ch. 10*, is not merged in the act of 1794, *ch. 54*, but is now in full force and frequently practised under. *Ib.*
16. The failure of a plaintiff in a *ca. sa.*, to call on the sheriff at the return of the writ to produce the body of the defendant in court, does not furnish any ground of presumption, in an action against the sheriff for a default, that the defendant was discharged out of the custody of the sheriff by the consent of the plaintiff. *Ib.*
17. The failure of a plaintiff to pursue one legal remedy against a sheriff in default, cannot be construed into the abandonment of another legal remedy against that officer, for the same default. *Ib.*
18. In an action on a sheriff's bond, for an alleged permissive escape by the sheriff of a party arrested on a *ca. sa.*, which that officer had returned *cepi*, the plaintiff may show that such return is untrue in point of fact, and that the sheriff had not the body of the defendant in court, at the return day of the writ, ready to be delivered up on the demand of the plaintiff. *Ib.*
19. After an arrest under a *ca. sa.*, and a permissive escape before the return day has been proved, the burthen of showing, that the sheriff had the body of the defendant in court, according to the exigencies of the writ and his return of *cepi* thereto, is upon the sheriff. *Ib.*
20. In an action on the case at common law against the sheriff for an escape, he may offer evidence in mitigation of damages. The

EXECUTION—*Continued.*

- amount recovered against the party arrested, is not conclusive on that question. *Ib.*
21. There is no precise form of return prescribed by law, for returns of levies made by constables to writs of *fi. fa.*. The term *levied* in such returns imports a seizure, by common usage. *Ib.*
 22. Seizure under an execution is a matter in *pais*, which may be proved by *parol* evidence. *Ib.*
 23. It is not the constable's return which gives title to a purchaser under a *fi. fa.*, but the seizure and sale under the writ. The return is evidence, but not the only admissible proof of those facts. *Ib.*
 24. A statement of the seizure and sale in the receipt for the purchase money given to the vendee, would be as effectual to transfer the title to the *personal property* described in it, as the most formal return, endorsed on, or attached to the writ. *Ib.*
 25. The seizure, sale, and payment of the purchase money, may also be established by oral testimony, and be equally valid for the purchaser as a return. *Ib.*
 26. If the sheriff give time to a purchaser at his sale, to pay the purchase money, without the assent of the creditor, the latter is not bound by it. *Hardesty vs. Wilson*, 481.
 27. It does not follow, that because a bidder is found upon an offer for sale of property, levied on under a *fi. fa.*, and he makes the highest bid, that the supposed sale to him discharges so much of the debt. *Ib.*
 28. The bidder acquires no title to the thing purchased, but by payment of the purchase money, and if he fails to do this within a reasonable time, a re-sale may be lawfully made. *Ib.*
 29. The seizure, upon a *fi. fa.*, is not a satisfaction of the debt. *Ib.*

EXECUTOR AND ADMINISTRATOR.

1. The accounts of an administratrix, making a distribution of her intestate's estate in money, no creditor nor fraud appearing, will not, after a lapse of sixteen years, be disturbed in equity, where she was guardian to her infant children, and paid them the interest on the sum distributed to them during her life, and her successor in the guardianship received the amount distributed, from her personal representative, though she had taken to her own account, certain portions of her intestate's estate at their appraised value, which portions remained in *esse* at the time of her death. *Ridenour et. al. vs. Keller*, 134.
2. The court will presume that distribution of an intestate's estate, had, after a lapse of four years, been made, where creditors were not interested; no charge of fraud made; and it appearing that, all the distributees had received their proportions of the appraised value of the estate in money, and some of them had disposed of the same. *Ib.*
3. Where an administratrix took a portion of her intestate's estate, to her own account, at the appraisal, and paid the distributees their portions of the estate in money, which they kept for four years, and alleged no fraud; the distributees, seeking to set aside

EXECUTOR AND ADMINISTRATOR—*Continued.*

- her settlements, must first do equity, and return what they have received, or offer so to do. *Ib.*
4. Where a will authorized an executor to sell the residue of the testator's real and personal estate within two years from his decease, a sale made within the two years is valid, though the conveyance to the purchaser was not executed until after that period, and parol evidence is admissible to show the time of sale. *Harlan vs. Brown*, 475.
 5. The act of 1831, ch. 315, sec. 10, does not relate to sales of real property, made before that statute went into operation. *Ib.*

FRAUD.

1. A sale of land made by a sheriff, under execution, to his own agent, is not necessarily void at law. It is voidable for fraud in fact. *Isaac and wife vs. Clarke*, 1.
2. The jury alone is the proper tribunal to pronounce on the fact of fraud; and the circumstance that the purchaser is an agent of the sheriff will be regarded with much suspicion. *Ib.*
3. A conveyance obtained by a general agent from his principal, will be vacated for fraud in its obtention; or, because of the principal being a man of such feeble intellect, as to be incompetent to the management of his own business; or in consequence of the terms being so unjust and unequal, as therefore to be unconscientious. *Brook et al. vs. Berry*, 83.
4. The feeble intellect of a grantor; the relation of principal and general agent between him and the grantee; inadequacy of price for land conveyed by such a grantor to such a grantee; are all circumstances calculated to impeach a deed, as constructively fraudulent. *Ib.*
5. Upon a bill in equity, filed by the holder of an equitable title to vacant land under the State, against the patentee of the same land, to vacate the patent as fraudulently obtained, the State need not be made a party. Ample relief may be had without the State, who has no interest in such a case. *Hoye vs. Johnston*, 291.
6. Where a party has presumed or actual notice of a location made, and prevails upon a public surveyor to violate the instructions under which he was acting, and to misrepresent to other officers of the State, who were to judge of the fairness and regularity of such surveyor's proceedings, that in executing a warrant, he had conformed to the rules of the land office, and had so enabled a party to obtain a patent for land, this is a fraud affecting such patent. *Ib.*

See ESTOPPEL,

EVIDENCE 39, 40.

FREIGHT. See SHIPS AND SHIPPING, 5.

INSURANCE, 4.

GOODS SOLD AND DELIVERED.

See ASSUMPSIT.

SHIPS AND SHIPPING.

GUARANTY. *See* BILLS OF EXCHANGE, 3.

GUARDIAN AND WARD. *See* ORPHANS COURT, 1, 2.

HEIR.

1. One may be heir apparent, or heir presumptive, but not *very* heir, living the ancestor; no one is recognized as heir, until the death of his ancestor. *Mitchell vs. Mitchell*, 231.
2. One cannot take, as *purchaser*, under the description of *heir*, or *heir male*; unless, when the estate is to vest, he has, by the death of his ancestor, become *very* heir. *Ib.*
3. This is the general rule, subject only to this exception, that when the intention of the testator can be made clearly to appear from the will, that he did not mean the words, *heir* or *heir male*, to be used in their technical sense, then the popular sense shall prevail. *Ib.*
4. *Prima facie*, the word *heir* must be taken in its technical sense, as a word of limitation. *Ib.*

HUSBAND AND WIFE.

1. Where a testator devised all the rest, residue and remainder of his estate unto all the children of his sister and his late brother, that are now in existence, to be equally divided amongst them *per capita*, share and share alike, one of his nieces alive at the date of the will, married, and died before the testator. The sister and late brother had each five children alive at the date of the will. **HELD:** that the surviving husband of the deceased niece, was entitled to one-tenth of the testator's personal estate in the hands of his executor. *Aldridge, ex'r of Higdon vs. Boswell*, 37.

INJUNCTION.

1. Where an injunction issues to restrain proceedings at law, upon the ground of credits not allowed, and the defendant admits the credits in his answer, and consents to allow them, the injunction should be dissolved as to the balance due. *Welch vs. Parran*, 320.
2. A judgment creditor issued a *fi. fa.*, and sold the land of his debtor. The sheriff, without his consent, gave time to the purchaser to pay for the land, and the purchase money not being all paid, the creditor ordered the sheriff to proceed to a re-sale of the property levied on. The debtor is not entitled to an injunction to stay such re-sale. *Hardesly vs. Wilson*, 481.

See COURT OF CHANCERY, 12.

INQUISITION. *See* ACTION UPON THE CASE, 1, 2, 3, 4.

JUDGMENT, 1.

RAIL ROAD CORPORATIONS, 1, 2, 3; 4, 5, 6, 7.

INSOLVENT DEBTOR.

1. By the act of 1834, ch. 336, (passed 21st March 1835,) any surety for the appearance of an insolvent petitioner is authorised to bring him into court, or before any judge thereof, as special bail may bring their principal into court, and when brought in, to surrender and commit him, provided that he be so surrendered before or at the first term to which suit shall be brought upon the bond for the appearance of such petitioner. **HELD:**

INSOLVENT DEBTOR—*Continued.*

- 1st. That such bonds are now assimilated to bail bonds.
 - 2nd. That the surety of such insolvent petitioner may surrender him at or before the *first term* of suit brought on such appearance bond.
 - 3rd. That the act applied to a bond executed on the 12th March 1835, the condition of which was not broken at the date of the passage of the act of 1834, ch. 336, and modified the remedy thereon.
 - 4th. That the surety is only called upon to exert his privilege under the act of 1834, after he is sued. *State, use of Holton vs. Burk et. al.*, 79.
2. Where the defendant made his note payable to the plaintiff, who passed it away for value, and afterwards, the plaintiff paid it, he may maintain an action for money paid for the defendant, though after the note fell due, and *before* the plaintiff had paid his endorsement, the defendant was released under the act for the relief of insolvent debtors. *Wharton et. al. vs. Callan*, 173.

INSURANCE.

1. Upon a valued policy on cargo, *tin*, shipped, or to be shipped, "at and from *New York* to *Baltimore*," the assured may recover a partial loss, for damage by sea water, caused by the perils of the seas, though the tin was not properly dunnaged and stowed. *Georgia Ins. & Trust Co. vs. Dawson*, 365
2. Underwriters are liable for a loss, the *proximate* cause of which, is one of the risks enumerated in their policy, though the *remote* cause may be traced to the negligence of the master and mariners. *Ib.*
3. The liability of the ship owner to the shipper for the negligence of the master and crew, cannot avail the insurer as a defence. Upon payment of the damage, the insurer may be subrogated to all the rights of the insured against the person answerable for bad stowage and dunnage. *Ib.*
4. Freight was insured on a voyage, at and from *M. V.* to *C. C.*, and at and from thence to *B.*, estimated at \$4000. It was due at *B.*, on the right delivery of the cargo there. The vessel proceeded to *C. C.*, and there delivered and took in cargo. While her lading was in progress, she was forcibly taken possession of by a foreign ship of war, and carried back to *M. V.*; where, after some detention, in March 1839 she was restored to her master, who claimed full freight from the charterer, which he resisted; and upon a submission to arbitration, the vessel was allowed \$1200, and the charter party cancelled. *C. C.* being now blockaded, the voyage was broken up and abandoned. On the 2nd May 1830, (forty-seven days after her capture,) the master chartered her on another voyage, from *M. V.* to *H.* In an action against the underwriter, it was HELD:
 - 1st. That as a contract of insurance is one of indemnity, the doctrine of *salvage* for freight, has been introduced as a fair item in the adjustment of actual loss; and that the underwriter was entitled to a credit for the sum paid the master, on account of freight.

2nd. The doctrine of *salvage* for freight is confined to freight earned on the particular cargo contemplated in the policy, or other freight earned on the same voyage. In such case, the insurer is only liable for the difference, because that is the extent of the actual loss by that voyage.

3rd. After time sufficient for the completion of the original voyage, had elapsed, the master of the vessel not being able to proceed on that, is at liberty to enter upon another, and distinct voyage: and the freight earned upon the latter voyage, will not enure to the benefit of the underwriter. *Charleston Ins. & Trust Co. vs. Corner*, 410.

4th. The time in which a voyage should be performed, is a question of fact? and not to be assumed, or asserted by the court. *Ib.*

5th. Upon a policy for account of whom it may concern, in an action by *A*, where the plaintiff did not disclose by the pleading, any other interest or damage, than that which *A* had, or sustained, he cannot recover for more than the proportion in which he was interested. *Ib.*

INTEREST. See TRUST AND TRUSTEES, 4, 5.

JUDGMENT.

1. Where an inquisition was taken, returned, and ratified, according to law, upon proceedings by a rail road company, which found that a piece or parcel of land was wanted by the company for the construction of their road, and assessed the damages which the owner of the fee would sustain by the use and occupation of his land for the purpose aforesaid, at, &c., all questions having relation to the damage done by the location and construction of the road are terminated and concluded by such inquest. *Balt. & Sus. R. Road Co. vs. Compton et. al.*, 20.
2. The confession of a judgment, to be released on payment of what *F* shall say is due, cannot be considered as a reference under the act of 1778, ch. 21. It is a final judgment. *State, use of Welsh and wife vs. Jones et. al.*, 49.
3. The various provisions of that act, all contemplate a case still pending in court, and awaiting the return of the award before a judgment is to be rendered. *Ib.*
4. The words *payment* and *due* in such a confession import that a sum of money, was alone in the view of the parties, and hence no other authority was given by it, but to certify the sum of money on payment of which the judgment should be released. *Ib.*
5. Under such a confession, the party who was to ascertain the sum has no authority to award or determine, that the judgment should be released on payment of, &c., in *negro property*, at the original appraisement, belonging to the estate of *H*. *Ib.*

See EJECTMENT, as to effect of Judgment in, as a bar to a lease, 9 to 13, EVIDENCE, 43, 44, as to incidental effect of Decree.

LANDLORD AND TENANT, 5 to 10.

SHERIFF, 3, 5, 6, 7.

JURORS—JURY.

1. Where it appeared that the defendant, in an action of ejectment, had conveyed his lands to R, who had died intestate, and that one of the jurors empaneled to try the cause was his brother and heir-at-law, the fact of the conveyance being unknown to the plaintiff when the jury was sworn, the court will permit the juror to execute a deed of re-conveyance and release to the defendant, for the purpose of restoring his competency. *Isaac and wife's lessee vs. Clarke*, 1.
2. The jury alone is the proper tribunal to pronounce on the fact of fraud ; and the circumstance that the purchaser is an agent of the sheriff will be regarded with much suspicion. *Ib*,

See PRACTICE, 2, 3, 16.

RAIL ROAD CORPORATIONS, 3, 4.

LAND OFFICE.

1. A *second* patent for the same land will not be granted, according to the rules of the land office, until the *first* be vacated. *Hoye vs. Johnston*, 291.
2. *H*, on the 5th September 1839, obtained a warrant of re-survey, to affect contiguous vacancy in *Allegany* county. On the 19th May, he made a survey ; on the 31st July, returned his certificate into the land office, and on the 18th February 1841, paid the composition money. On the 29th June 1840, *J* obtained a special warrant ; on the 11th July, executed his survey ; on the 24th, paid the composition money, and on the 27th January 1841, obtained a patent for his survey. This done, he successfully *caveated* the application of *H*, for a patent on his survey. It appeared that *H* was seized of the tract which his warrant was issued to re-survey ; had made his survey before *J* obtained his special warrant, and paid his composition money in time ; his title relates to his survey of the 19th May 1840, and was prior in point of equity to *J*'s title. *Ib*.
3. Under the act of 1822, ch. 128, sec. 3, the composition money for vacant land in *Allegany* county, may be paid within twelve months after the date of the certificate of survey. *Ib*.
4. By the terms of a special warrant, a party is forbidden from running his lines within the lines of any former or more ancient survey. *Ib*.
5. A party who sues out of the land office, a general or special warrant of survey, to take up vacant lands, has an opportunity to know, and is presumed to know, that before he obtained his warrant, another warrant for the same land, if the fact be so, had actually been located. *Ib*.
6. Where a party has presumed or actual notice of a location made, and prevails upon a public surveyor to violate the instructions under which he was acting, and to misrepresent to other officers of the State, who were to judge of the fairness and regularity of such surveyor's proceedings, that in executing a warrant, he had conformed to the rules of the land office, and had so enabled a party to obtain a patent for land, this is a fraud affecting such patent. *Ib*.

See RIPARIAN PROPRIETOR.

LANDLORD AND TENANT.

1. The general rule is, that a party consenting to hold as lessee, cannot afterwards deny the title of his acknowledged landlord. *Isaac and wife's lessee vs. Clarke*, 1.
2. There are exceptions to this rule; but they do not rest on the fact, that the acknowledgment was made by the tenant subsequent to his coming into possession, or that he originally had possession under another title. *Ib.*
3. The circumstances of deception, mistake, or other grounds, which exempt a tenant from the influence of the rule, apply as well to the case of admissions after his possession commenced, as before. *Ib.*
4. Where a party is in possession, and enters into an agreement with another claiming the land, to become his tenant, he is within the general rule, which forbids the tenant from questioning the landlord's title. A relation thus created does not, *per se*, constitute one of the exceptions to that rule. *Ib.*
5. The statute 4 *Geo. 2*, *ch. 28*, requires, that to render a judgment by default, *conclusive* upon the rights of a tenant, and bar his future recovery of the demised premises, it shall be made appear to the court where the suit is depending, by affidavit, that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found upon the demised premises, countervailing the arrears of rent then due, and that the lessor in ejectment had power to re-enter; in every such case the lessor shall recover judgment and execution, in the same manner, as if the rent in arrear had been legally demanded. *Walter et al. vs. Alexander and wife*, 204.
6. To make a judgment by default, a bar to a lease under the statute of 4 *Geo. 2*, the record must disclose such facts and circumstances, as will justify the court in believing, or assuming, that in rendering its judgment, the court below designed to exercise the authority conferred on it by that statute. *Ib.*
7. When all the proceedings in ejectment, until long after the judgment by default, show it to have been an ordinary case of ejectment, having no connexion with the statute, there is nothing to warrant the assumption, that the judgment was rendered under the authority of the statute. *Ib.*
8. Where the affidavit required by the statute was filed in vacation, at a different term from that of the judgment, and more than ten months after its rendition; and which, according to the proof, was never shown to the county court, this court will not assume the judgment was given on the affidavit, according to the obvious import and design of the statute. *Ib.*
9. The affidavit in such cases, should be filed before the judgment by default is entered, or some time during the term at which it was rendered; so that before the judgment became absolute, the court may have had an opportunity of inspecting and adopting the affidavit, as the basis of its judgment. *Ib.*

LANDLORD AND TENANT—*Continued.*

10. The court will not presume, that an affidavit was filed, pursuant to the statute, after a lapse of seventeen years, where it clearly appears, that in fact it was not so filed; yet if filed in time, the court will be presumed to have discharged their duty in relation to it. *Ib.*
11. The tenant in fee of a lot binding on the basin of the city of *Baltimore*, leased the same for a term of years, reserving a right to distrain and re-enter; and granted his lessee "the exclusive right of extending, not exceeding, &c., into the water, any and every part of said lot which fronted the basin, provided he could obtain permission for that purpose, from the *Mayor &c. of Baltimore*, or the legislature of the *State*. The reversion of this lot was sold to *O*, who recovered the leased premises by ejectment for non-payment of rent, and applied to the corporation of *B* for liberty to extend the lot into the basin, according to the original lease, which was granted, and the extension made. **Held:**
 - 1st. That the right to make the improvement, and it, when made, did not remain in the heirs of the first tenant in fee, who leased it.
 - 2nd. By the sale of the reversion to *O*, all the right of the original tenant in fee, both in the lot, and the permission to extend the same, as granted by the lease, vested in *O*.
 - 3rd. By the forfeiture of the lease, consequent upon the recovery in ejectment, no right reverted to the first tenant.
 - 4th. That if the lessee had made the improvement under the permission granted by his lease, the lessors and his assigns could have distrained or re-entered upon it, as upon the original lot. *City of Baltimore vs. White*, 444.

LEASE. See LANDLORD AND TENANT.

LEGACY—LEGATEE.

1. Where an estate, charged with the payment of a legacy, descends to the legatee, the lien becomes extinct, by the union of the title, and the charge, in the same person. *Mitchell vs. Mitchell*, 231.
- See WILL AND TESTAMENT, 1.

LESSOR—LESSEE—LEASE.

1. The statute 4 *Geo. 2, ch. 28*, requires, that to render a judgment by default, *conclusive* upon the rights of a tenant, and bar his future recovery of the demised premises, it shall be made appear to the court where the suit is depending, by affidavit, that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found upon the demised premises, countervailing the arrears of rent then due, and that the lessor in ejectment, had power to re-enter; in every such case the lessor shall recover judgment and execution, in the same manner, as if the rent in arrear had been legally demanded. *Walter et al. vs. Alexander and wife*, 204.

LICENSE.

1. Where one party authorises another to divert the channel of a stream, flowing through the lands of both, by means of a license which is

LICENSE—*Continued.*

- countermandable in its nature, and the authority is exercised as granted, the party who has the power of countermand, can only be restored to his rights, by doing justice to the other, and tendering him the expense which he has incurred under the license. *Addison vs. Hack*, 221.
2. Where the plaintiff verbally agreed to abandon the use of a stream of water in the manner in which it had been accustomed to flow on his land, and the abandonment was consummated by the execution of his license, from that moment, his right to the use of the water, as it formerly flowed in its natural channel, became extinct; and it was no longer appurtenant to his land. *Ib.*
 3. Such license conveys no estate, interest, or use in the land; is not within our registry acts; nor calculated to mislead purchasers. *Ib.*

LIMITATION OF ACTIONS.

1. Upon the single bill of *B*, dated 20th July 1827, promising to pay the "*heirs, administrators or assigns, of the estate of D, deceased*," an action was commenced by the administrators of *D*, on the 8th February 1839. The writ was regularly renewed from term to term, until November term, 1839, when it was suggested, that the said letters of administration had been revoked and granted anew to *S*, who sued out another writ, in his own name, to the next succeeding term; which being returned *non est*, and regularly renewed for several terms, he then procured an attachment. This was levied and returned. The defendant, now, gave special bail and appeared, and the last administrator declared against him on the single bill, specially stating the revocation of the first letters. **HELD:** That it was uncertain, upon the face of these instruments, to whom they were to be delivered, or in whose name a suit must be brought; that no action could be brought on them; and, that limitations were a bar to the action. *Bennington vs. Dinsmore*, 348.
2. Where there are more writs than one, it must appear, that they are regular continuances of each other, to except the case from the act of limitations. *Ib.*
3. Writs issued in the name of *S*, administrator of *D*, cannot be regular continuances of writs issued by *G*, administrator of *D*; though the authority of the latter had been revoked. *Ib.*

MANDAMUS—

To enforce payment of Taxes. *See TAXES.*

MATERIAL MEN. *See SHIPS AND SHIPPING.*

MAXIMS.

1. The maxim, "*volenti non fit injuria*," illustrated. *Addison vs. Hack*. 221.
2. One may be heir apparent, or heir presumptive, but not *very* heir, living the ancestor; no one is recognized as heir, until the death of his ancestor. *Mitchell vs. Mitchell*, 231.
3. Every contingent remainder must *vest eo instanti*, that the particular estate determines. *Ib.*

MERGER.

1. Where an estate, charged with the payment of a legacy, descends to the legatee, the lien becomes extinct by the union of the title and the charge, in the same person. *Mitchell vs. Mitchell*, 231.
2. Where parties submit matters in controversy, for the purpose of a final determination, and the arbitrators make an award, the original contract or cause of action is merged by the submission and award; and there is no distinction, in this respect, between submissions by parol, and by bond. *Randall vs. Glenn*, 430.
3. There is a distinction between a submission by parties to the judgment of two or more individuals who are to decide the controversy, and a reference of a collateral, incidental matter of appraisement, or calculation, or the submission of a particular question, forming only a link, in the chain of evidence, not calculated to put an end to controversy. *Ib.*

MORE OR LESS—

For effect of words: *See* CONTRACT, 1.

MORTGAGE—MORTGAGOR—MORTGAGEE.

See DEBT, 1.

DOWER.

ESTOPPEL, 1, 2, 3, 4.

ORPHANS COURT.

1. This court, in reviewing the judgments of the county courts, cannot exercise the powers of a court of probate as to last wills and testaments of personal property. *Hannon et al. vs. the State, use of Robey*, 42.
2. It is the duty of the *Orphans court* in appointing a guardian, to consult the interest, rather than the wishes of an infant. *Compton vs. Compton*, 241.
3. An appeal will not lie from an order of the *Orphans court*, appointing a guardian. *Ib.*
4. The act of 1831, ch. 315, sec. 10, does not relate to sales of real property, made before that statute went into operation. *Harlan vs. Brown*, 475.

See EVIDENCE, 5, 6.

WILL AND TESTAMENT.

PARTIES IN EQUITY.

See PRACTICE IN CHANCERY, 6.

PATENT. *See* LAND OFFICE.

PERSONAL ESTATE.

See TAXES, as to Rail Road Shares, being in certain cases declared.

PLEAS AND PLEADING.

1. Where the defendant pleaded general performance, and after the plaintiff replied assigning a breach of the condition of a bond, the defendant rejoined generally, on which the issue was made up. This rejoinder under such circumstances can only be considered a general traverse of the plaintiff's replication. It only puts in issue the facts

PLEAS AND PLEADING—*Continued.*

stated in the replication. *Hannon et al. vs. the State, use of Robey, 42.*

2. Where the plaintiff assigned breaches in a special replication, it is the duty of the defendant to rejoin specially, and a general rejoinder of general performance to such a plea, to give it any operation at all, can only be considered as a general traverse of the facts of the replication. *Ib.*
3. The action on the sheriff's bond to recover damages for an escape, is neither the common law action on the case, nor the remedy granted by the statutes of *Edward* and *Richard*. *State, use of Creecy vs. Lawson et. al., 62.*
4. There are many instances in which, on the assignment or suggestion of breaches under the *Stat. 8* and *9 Will. 3*, the measure of damages is fixed and certain, but they arise from the peculiar circumstances of each case, and not from any general rule. *Ib.*
5. An action of debt cannot be maintained upon a deed of mortgage, reciting that the grantee was indebted to the grantor in a sum certain, and that the deed was executed for the better securing the payment thereof, with a proviso, after the *habendum* of the instrument, that upon payment of the money the deed should be void, there being no covenant in the deed to pay the debt. *Barrell vs. Glover et. al., 171.*
6. Upon a policy for account of whom it may concern, in an action by *A*, where the plaintiff did not disclose by the pleading, any other interest or damage, than that which *A* had, or sustained, he cannot recover for more than the proportion in which he was interested. *Charleston Ins. & Trust Co. vs. Corner, 410.*
7. Where the plaintiff's demand is set forth in a general count, as for money lent, &c., the defendant may, at any time, before he has pleaded to the merits, call on the plaintiff to exhibit the particulars of his claim. *Randall vs. Glenn, 430.*
8. After pleading to the merits, it seems to be too late to object to the want of a statement of the particulars of the plaintiff's demand, or that the same is defective. *Ib.*
9. At the term to which an action was brought, the defendant demanded a bill of particulars, which the plaintiff furnished; several terms afterwards, the defendant pleaded the general issue; at the next term, when the cause was called for trial, the defendant excepted to the sufficiency of the statement. This objection came too late. *Ib.*

PLEAS AND PLEADING IN EQUITY.

1. Where a complainant alleged the existence of a contract with the defendant, accompanied with collateral circumstances, and called upon him not to state what the contract was, but to admit or deny the existence of the agreement and circumstances set forth; and the defendant, in his answer, averred another agreement between him and the complainant, and denied the collateral circumstances: the statement of the agreement by the defendant in such

PLEAS AND PLEADING IN EQUITY—*Continued.*

case is not *simply* responsive to the contract he was called on to admit or deny. It is not such a denial as requires two witnesses, or one with concurring circumstances to disprove it; nor in this case was it necessary to disprove the denial of the collateral circumstances by the same amount of proof. *Jones vs. Belt*, 106.

2. A decree which refers to the bill for a description of the lands on which it is intended to operate, is not vague and uncertain in that respect. *Ib.*

POWER.

See EXECUTOR AND ADMINISTRATOR, 4, for execution of, within time.

PRACTICE.

1. Where it appeared that the defendant, in an action of ejectment, had conveyed his lands to *R*, who had died intestate, and that one of the jurors empaneled to try the cause was his brother and heir-at-law, the fact of the conveyance being unknown to the plaintiff when the jury was sworn, the court will permit the juror to execute a deed of re-conveyance and release to the defendant, for the purpose of restoring his competency. *Isaac and wife's lessee vs. Clarke*, 1.
2. An inquisition to condemn land for the use of the *B. and S. Rail Road Company*, in *Baltimore* county, out of the limits of the city of *Baltimore*, ought not to be held upon the warrant of a justice of the peace appointed for said city. *Per Baltimore county court. Baltimore & Susq. R. R. Co. vs. Compton, et al.*, 20.
3. Under the act of 1827, ch. 72, resident jurors in the city of *Baltimore* may be summoned to act in any part of *Baltimore* county. *Ib.*
4. The courts of *Maryland* have, for a long period, sanctioned the abbreviated form of a return, *cepi*, by the sheriff, to the writ of *capias ad satisfaciendum*. *State, use of Creecy vs. Lawson et al.*, 62.
5. Such a return is in legal effect, a declaration by the sheriff on oath, that by virtue of the writ, he had taken the body of the defendant, and him had ready to produce before the court, at the time and place, as commanded by such writ. *Ib.*
6. On a judgment by default in a suit on a sheriff's bond for an escape, the court would not assume the power of assessing damages and giving final judgment. *Ib.*
7. The act of 1768, ch. 10, is not merged in the act of 1794, ch. 54, but is now in full force and frequently practised under. *Ib.*
8. The failure of a plaintiff in a *ca. sa.*, to call on the sheriff at the return of the writ to produce the body of the defendant in court, does not furnish any ground of presumption, in an action against the sheriff for a default, that the defendant was discharged out of the custody of the sheriff by the consent of the plaintiff. *Ib.*
9. In this State, anterior to the act of 1811 *ch. 161, sec. 2*, if the sheriff made an arrest under a *capias* on final process, and suffered the party arrested to escape, he could not again arrest the same party, on the same process, without rendering himself obnoxious to an action of trespass for false imprisonment. *Ib.*

PRACTICE—*Continued.*

10. This disability was removed by that act, and the power conferred on the sheriff to make a second arrest, of the same party, by virtue of the same process. But it did not protect the sheriff against the demand of the plaintiff in the process for an escape. *Ib.*
11. The act of 1828, *ch. 50, sec. 2*, declared, that if the sheriff produced the body of the defendant at the return day of the writ, he should not be liable for any intermediate escape. This act is not confined to arrests on *mesne* process, but applies to *final* process, *attachment* as well as *capias*. *Ib.*
12. Before the act of 1828, the sheriff on *mesne* process was authorised to arrest the defendant a second time; and the reason and policy of the law was by it extended to arrests on *final* process. *Ib.*
13. Where a sheriff arrests the defendant on *final* process, and has him ready to be delivered up at the return day of the writ, on the demand of the plaintiff, this in law is a performance of his duty. *Ib.*
14. By act of 1834, *ch. 336*, the surety of an insolvent petitioner may surrender him at or before the *first term* of suit brought on such appearance bond. *State, use of Holton vs. Burk et al.*, 79.
15. That the surety is only called upon to exert his privilege under the act of 1834, after he is sued. *Ib.*
16. Although upon the whole testimony in a cause, on both sides taken together, the conclusions of a judge might be, if acting as a juror, that the verdict should be for the defendant, yet if there is evidence legally sufficient to warrant the jury in finding for the plaintiff, when left unaffected by the defendant's proof, the court will not say to the jury upon the motion of the defendant, that there is no evidence in the cause, or that the plaintiff's cause is not proven. *Tiffany vs. Savage*, 129.
17. When, before a court can grant a prayer it must assume the non-existence of all the testimony not enumerated in it, and thus exclude material evidence from the consideration of the jury, or assume facts of which no proof had been offered, to grant it would be to transcend its jurisdiction, and exert a power which belonged exclusively to the jury, or which could not be exercised in the particular case, either by the court, or jury. *Byer vs. Etnyre and Besore*, 150.
18. The construction of a statute in every part of the State must be the same; a practice in a particular part of the State, inconsistent with its letter and spirit, cannot repeal it. *Walter et al. vs. Alexander and wife*, 204.
19. As to the practice of filing affidavits in actions of ejectment, to vacate leases, under the statute 4 *Geo. 2*, *ch. 28*, see Ejectment 9 to 13.—Landlord and Tenant 5 to 10.
20. In an action relating to lands, if the defendant does not take defence on warrant, the plaintiff is under no obligation to ask for a warrant to locate his land, or any of the matters in controversy between the parties. *Addison vs. Hack*, 221.
21. In such case, without plots, he may read his title papers in evidence;

PRACTICE—*Continued.*

- prove his possessions under them; and show by oral, and other testimony, the injury he complains of, and for which he seeks indemnity. *Ib.*
22. The rule of *Baltimore* county court, which requires that the whole testimony intended to be produced by plaintiff and defendant shall be offered before any question of law is raised, except objections to the competency of testimony, is such a rule as that court has power to make. *Gist and Scott vs. Drakely*, 330.
23. When a party fails to offer any evidence, at the time he ought to have offered it, under the foregoing rule, this court will not assume that it was then out of his reach, or was afterwards discovered. *Ib.*
24. The observance of such rule may be dispensed with, by consent. *Ib.*
25. Where there are more writs than one, it must appear, that they are regular continuances of each other, to except the case from the act of limitations. *Bennington vs. Dinsmore*, 348.
26. Writs issued in the name of *S*, administrator of *D*, cannot be regular continuances of writs issued by *G*, administrator of *D*; though the authority of the latter had been revoked. *Ib.*
27. For repairs made to a carriage for the benefit of the defendants, and with their knowledge and approbation, they would be liable; but whether so made, is a question for the jury. *Rogers & Marfield vs. Severson*, 385.
28. In what character a person who takes a carriage to a mechanic to be repaired, is in possession, whether as driver, servant, agent, or owner, is a fact for the jury. *Ib.*
29. The jury are exclusive judges of the weight of parol evidence offered to them, tending to prove an agency. *Henderson vs. Mayhew*, 393.
30. The time in which a voyage should be performed, is a question of fact, and not to be assumed, or asserted by the court. *Charleston Ins. & Trust Co. vs. Corner*, 411.
31. Where the plaintiff offered in evidence verbal and written testimony, to maintain his issue in an action of *assumpsit*, part of which, in writing, was admitted by the defendant, as evidence of the facts recited in it; part, as if regularly proved under a commission—another portion being a deposition of a witness, no part of the plaintiff's proof being contradicted, he cannot assume that the jury will find the facts accordingly; and pray the court to instruct them, upon that assumption. *Ib.*
32. The sufficiency of evidence to satisfy a jury, or the circumstance, that it is all on one side, does not authorize the court to direct them, that it proves a fact in controversy. *Ib.*
33. The jury have the power to refuse their credit to parol testimony, and no action of the court should control the exercise of their admitted right, to weigh its credibility. *Ib.*
34. Where the plaintiff's demand is set forth in a general count, as for money lent, &c., the defendant may, at any time, before he has pleaded to the merits, call on the plaintiff to exhibit the particulars of his claim. *Randall vs. Glenn*, 430.

PRACTICE—*Continued.*

35. After pleading to the merits, it seems to be too late to object to the want of a statement of the particulars of the plaintiff's demand, or that the same is defective. *Ib.*
36. At the term to which an action was brought, the defendant demanded a bill of particulars, which the plaintiff furnished; several terms afterwards, the defendant pleaded the general issue; at the next term, when the cause was called for trial, the defendant excepted to the sufficiency of the statement. This objection came too late. *Ib.*
37. The motion, to direct an amendment of a bill of particulars, filed in due time, made after plea, pleaded to the merits, at the trial term, is addressed to the sound discretion of the court; and therefore is one from which an appeal does not lie, any more than it will on a refusal to grant a new trial. *Ib.*
38. It is for the court to decide on the admissibility of evidence, but the comparative value, or weight of testimony, is for the consideration of the jury. *Harlan vs. Brown*, 475.

See JURORS—JURY, 2.

PRACTICE IN CHANCERY.

1. Exceptions to proof taken under a commission, will not avail the party making them, where the only tendency of the proof excepted to, is to establish facts admitted in the defendant's answer, or satisfactorily proved by other testimony which stands exempt from all objection. *Brooke et al. vs. Berry*, 83.
2. A general exception to all the testimony taken under an *ex parte* commission, on the ground that it was vacated and set aside by an order of court rescinding an interlocutory decree, to let in a defendant's answer, cannot be sustained, when the proof was taken prior to the rescision of such decree. *Ib.*
3. The act of 1820, ch. 161, sec. 3, provides, that the filing of an answer, after an interlocutory decree is rescinded under that act, shall in no case affect the validity of any commission previously issued to take testimony, or the proceedings under it, or of any testimony previously taken and returned under any such commission: the efficacy of the proof is the same, whether previously or subsequently returned into court. *Ib.*
4. Notice of the execution of an *ex-parte* commission, under the act of 1820, need not be given to the defendant. He has no power, either to offer proof under such commission, or to cross-examine the complainant's witnesses. *Ib.*
5. The court will fix a time, in their decree, within which a devisee bound to elect, must make an election; and if the election is *not* to take the estate in fact used and enjoyed under the will, the court will further decree an account of rents and profits of the part so held and used. *McElfresh adm'r vs. Schley and Barr*, 181.
6. Upon a bill in equity, filed by the holder of an equitable title to vacant land under the State, against the patentee of the same land, to vacate the patent as fraudulently obtained, the State need not be made

PRACTICE IN CHANCERY—*Continued.*

- a party. Ample relief may be had without the State, who has no interest in such a case. *Hoye vs. Johnston*, 291.
7. An equitable title to vacant lands, will, in equity, prevail against a legal title, when the party possessed of the legal title, has procured it by means of fraudulent representations to the officers of the land office. Upon a bill, in such case, the patent will be vacated in favor of the equitable title, or the patentee decreed to convey the land to the injured party. *Ib.*
 8. Where an injunction issues to restrain proceedings at law, upon the ground of credits not allowed, and the defendant admits the credits in his answer, and consents to allow them, the injunction should be dissolved as to the balance due. *Welch vs. Parran, et al.* 320.
 9. The trustees appointed by decree to sell real property, on the 21st June 1841, and 12th October 1842, offered it at public sale without success. A minimum price was then agreed on by the parties, and the property offered at private sale, without avail. The trustees and parties concerned, then agreed to sell, at private sale, for a fixed sum, if that could be obtained, and after unusual efforts, a purchaser was procured at that sum. Under such circumstances, as the Chancellor would have authorized the sale in the absence of all proof to impeach it, he properly ratified it, though one of the parties to the cause objected to it, as a sacrifice of his interest. *Tyson vs. Mickle et al.*, 376.
 10. When a trustee exercises a power, which, if previously applied for, would have been granted, as it were, as a matter of course, a court of equity, in the absence of proof showing the inexpediency and injustice of so doing, will ratify the act done, in the same manner as if the requisite authority had been applied for, and granted. *Ib.*
 11. The report of a sale made by trustees of the court, and their answers to a petition impeaching their sale, must be credited, until over-ruled by proof. *Ib.*
 12. Improvement in price, arising from a general enhancement in value since the sale, is no ground for setting aside a sale made under a decree. *Ib.*
 13. The ratification or rejection of a sale, must depend on the state of circumstances existing at its date, not on subsequent contingencies; depreciation of property is at the risk of the purchaser, and he must reap the fruits of appreciation. *Ib.*
 14. If there is any error in proceedings in Chancery, of which a trustee has any right to complain, he may have appeal therefrom. *Richardson vs. the State, use of Rawlings*, 439.
 15. It is the duty of a trustee, acting under a decree for a sale, as soon as an order has passed distributing the proceeds thereof, and he has received the same, either to pay over the fund to the party directed to be paid, or carry the same into court. *Ib.*
 16. For money detained against such duty, the jury may give interest, by way of damages. *Ib.*

See COURT OF CHANCERY.

PRACTICE IN THE COURT OF APPEALS.

1. Where no question is raised upon the admissibility, as evidence of a paper read in the county court to the jury, this court, under the act of 1825, ch. 117, will not consider that question *Hannon et. al. vs. the State, use of Robey and wife*, 42.
2. This court, in reviewing the judgments of the county courts, cannot exercise the powers of a court of probat as to last wills and testaments of personal property. *Ib.*
3. When the orphans court admits two papers of different dates to probat as testamentary instruments of the same party, and holds that one is not a revocation of the other, this court will presume that the orphans court acted correctly, and not disturb their judgment, when such papers are incidentally offered in evidence. *Ib.*
4. This court, in affirming the decree of the Court of Chancery, will make such appropriate additions to its terms, as may be necessary to secure to both parties, the benefits, advantages and prospective rights for which they mutually stipulate, in relation to which the decree appealed from was silent, or not sufficiently precise. *Ib.*
5. Where a defendant offers in evidence collaterally, proceedings in ejectment, and the plaintiff prays the court to instruct the jury, that they do not vest any title in the defendant, and are no bar to the plaintiff's right, such a prayer is not too general, under the act of 1825, ch. 117. *Walter et al. vs. Alexander and wife*, 204.
6. This court must assume, under such a prayer, that every ground which established either of the points relied on in it, was considered and determined by the county court. *Ib.*
7. An appeal will not lie from an order of the *Orphans court*, appointing a guardian. *Compton vs. Compton*, 241.
8. Upon a case stated, which does not authorise the court to give judgment for either party, this court can give no judgment, but must reverse that of the court below, and remand the cause. *Burgess vs. Pue*, 254.
9. Where repairs done to a carriage, enured to the benefit of a third person, who in fact, took it to be repaired, he is responsible; and where the state of the proof enables the jury to regard the case in that aspect, it is error to instruct them *imperatively*, that upon finding the fact of property in the defendants, and repairs made with their knowledge and approbation, that the plaintiff is entitled to recover. *Rogers and Marfield vs. Severson*, 385.
10. The motion, to direct an amendment of a bill of particulars, filed in due time, made after plea, pleaded to the merits, at the trial term, is addressed to the sound discretion of the court; and therefore is one from which an appeal does not lie, any more than it will on a refusal to grant a new trial. *Randall vs. Glenn*, 430.
11. Under the act of 1825, ch. 117, this court only reviews the questions decided by the county court, so that, where evidence is given without exception, the parties cannot object to its admissibility in this court. *Phelan & Bogue vs. Crosby*, 462.
12. A judgment at law reversed, without prejudice. *Ib.*

PRESUMPTION.

See EXECUTOR AND ADMINISTRATOR, for, of law, from lapse of time, 1, 2, 3.

CONSTITUTIONAL LAW, 7.

CORPORATIONS, 2, 3.

COURT OF CHANCERY, 16.

EJECTMENT, 12, 13.

ESTOPPEL, 6.

LAND OFFICE, 5.

PRIMARY SCHOOL, 12.

RIPARIAN PROPRIETOR, 3.

TRUSTS—TRUSTEES, 1, 2, 3.

PRIMARY SCHOOLS.

1. By the act of 1828, ch. 169, sec. 5, mere formal objections to the legality of the proceedings of the meeting of the inhabitants or trustees of any school district for the public instruction of youth in primary schools, or irregularity therein, are to be disregarded. *Burgess vs. Pue*, 11.
2. By the act of 1825, ch. 162, sec. 8, the collector of the school tax is to be appointed by the taxable inhabitants of the district, and by the 11th section he is required to give bond, with security, to the satisfaction of the trustees, for the faithful discharge of his official duties. The election to be valid must be made by the taxable inhabitants. *Ib.*
3. The act of 1839, ch. 90, makes no change in the power of appointing such a collector. *Ib.*
4. A collector of taxes not selected by competent authority, although he gives bond for the discharge of his duties, has no legal warrant to act, and all his proceedings are tortious and unlawful. *Ib.*
5. The legislature may delegate the power of taxation to the taxable inhabitants, for the purpose of raising a fund for the diffusion of knowledge and the support of primary schools, within their respective school districts. *Ib.*
6. Grants of similar powers to other bodies, for political purposes, have been coeval with the Constitution itself, and no serious doubts have ever been entertained of their validity. *Ib.*
7. In an action of *replevin*, brought by a taxable inhabitant against a collector of the school tax, to recover property seized for non-payment of such tax, due for 1843, having filed his affidavit on which he obtained the writ, affirming that the property had been unlawfully taken by such collector, he cannot maintain that the school district is disorganized, and the powers of the taxables suspended by reason of informalities in the proceedings of such district, for the year 1842.
Ib. 254.
8. Nor that the election for 1843 was void, because the minutes of the proceedings of the taxables did not state every thing to have been done, which the law requires to be done; as, that the election should be by ballot. It is not necessary that the mode of election should appear on the minutes, nor that they should show the clerk had bonded. *Ib.*

PRIMARY SCHOOLS—*Continued.*

9. The taxables when assembled, may vote a tax, as well for the expenses for the current year, as to pay arrearages due for essential expenses of the preceding year. *Ib.*
10. Notice of the time and place of meeting of the inhabitants, to authorise the imposition of a school tax under the act of 1825, should be given. *Ib.*
11. In such an action, the collector need not offer proof of his qualification. He is an officer *de facto*, and in the absence of proof, no presumption is to be made against his qualification. *Ib.*
12. The act of 1825, does not forbid the appointment of one of the trustees to be the clerk of the school district. *Ib.*
13. The legislature had the right to delegate to those appointed to exercise them, viz: the taxable inhabitants, the powers given by the act of 1825, ch. 162. The individuals to whom those powers were delegated, ought to conform to the provisions of the law under which they act; but the minutes of their proceedings need not show all the facts necessary to give them jurisdiction. Governed by the nature of the trust conferred, and the great confidence reposed by the law in the judgment of such inhabitants, the court will presume any thing which the law requires to be done, to be rightly done, until the contrary appears. *Ib.*

PRINCIPAL AND AGENT.

1. Gifts procured by agents, and purchases made by them from their principals should be scrutinized with a close and vigilant suspicion. *Brooke et al. vs. Berry*, 83.
2. Conveyances from principal to agent, and the circumstances which will infect them with fraud, considered. *Ib.*
3. Agents are not permitted to deal validly with their principals in any case, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition. *Ib.*
4. Various circumstances in relation to the possession and ownership of a carriage sent to a mechanic for repairs, stated, and considered, making a case for the exclusive consideration of the jury, whether the repairs were made by the authority of the defendants. *Rogers & Marfield vs. Severson*, 385.
5. Unless the vendor knows, at the time of sale of chattels, who his principal is, and notwithstanding such knowledge, makes the agent his debtor, the principal is not discharged. *Henderson vs. Mayhew*, 393.

PRINCIPAL AND SURETY. See VENDOR and VENDEE, 2, 3, 4, 5.

PURCHASER.

1. A prominent object of our enrolment laws is, the protection of purchasers. *Addison vs. Hack*, 221.
2. A grant, not acknowledged nor recorded, of a power to divert the course of a stream, which flowed through the grantor's land, but which power *had not been executed*, would not be a bar to a subsequent *bona fide* purchaser, for a valuable consideration, without no-

PURCHASER—*Continued.*

tice, claiming the water right naturally incident to the lands he had purchased. To interpose such a bar, in such a case, the same conformity to the registry laws is necessary, as if land were the subject of the grant. *Ib.*

See WILL AND TESTAMENT, 3 to 9.

RAIL ROAD CORPORATIONS.

1. After a rail road company had constructed its road by authority of law, through the plaintiff's land, condemned for that object, they were authorised to alter the location of their road between two given points: they re-constructed the road, and abandoned that part which had been made through the plaintiff's land. **Held:** that the authority derived from the legislature to alter the location, did not exempt the company from liability to the plaintiff for the loss sustained by him by reason of such abandonment. *B. & S. Rail Road Co. vs. Compton et al.*, 20.
2. Where a rail road company had constructed a road, then abandoned it in part, and changed the location *pro tanto*, a plaintiff through whose land the road originally passed, having sustained no damage or injury in fact, by the alteration, cannot maintain an action for such change of location. *Ib.*
3. An inquisition to condemn land for the use of the *B. and S. Rail Road Company*, in *Baltimore* county, out of the limits of the city of *Baltimore*, ought not to be held upon the warrant of a justice of the peace appointed for said city. *Per Baltimore county court. Ib.*
4. Under the act of 1827, ch. 72, resident jurors in the city of *Baltimore* may be summoned to act in any part of *Baltimore* county. *Ib.*
5. The description in an inquisition of land condemned, ought to be sufficiently certain. The omission to insert the name of the tract is not fatal. A description is sufficient when it calls for stones, trees, planted boundaries, fixed objects, or where it takes for the beginning of the land intended to be described, any spot or point of beginning on land either conveyed to the company and recorded, or on land theretofore condemned by inquisition, recorded. *Ib.*
6. The description in an inquisition beginning for the land condemned at station No. 147, on the location of said rail road, and running thence to station No. 170, being 23 stations of 100 feet each in length, and occupying a space of 66 feet in width, is not sufficiently accurate to authorise its ratification. *Ib.*
7. Under the charter of the *B. and S. Rail Road Company*, the inquisition for the condemnation of land should state that it was for the construction of the road, in that event the entire interest is condemned. *Ib.*
8. By the act of 1831, ch. 288, the *Baltimore and Port Deposit R. R. Co.* was chartered, to construct a rail road from *B.* to *P. D.* By the act of same year, ch. 296, the *Delaware and Maryland R. R. Co.* was also chartered, to construct a road from some point at the *Delaware* and *Maryland* line to *P. D.* By the act of 1835, ch. 293, the *D. and M. Co.*, was united to the *Wilmington and Susquehanna*

RAIL ROAD CORPORATIONS—*Continued.*

R. R. Co., a company chartered by *Delaware* under that name. By the act of 1837, ch. 30, the first named company was united with the *W. & S. R. R. Co.*, under the name of the *Philadelphia, Wilmington and Baltimore R. R. Co.* The first named company was located in *Baltimore* and *Harford* counties; and as to the second, which lies in *Cecil* county, *Maryland*, "the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the State, except that portion of the permanent and fixed works of the company, within the State of *Maryland*, and that any tax which shall hereafter be levied upon said section, shall not exceed the rate of any general tax, which may, at the same time, be imposed upon similar real and personal estate, within this *State*, for *State purposes*." **HELD:**

- 1st. That the shares and stock of the *D. & M. R. R. Co.*, its works, improvements, profits, and machinery of transportation, except, &c., were exempted from all taxation or levies, whether for county or State purposes.
- 2nd. The permanent and fixed works of the *Company* remained subjects of taxation or assessment, either for county or State purposes, or for both by virtue of the said exception.
- 3rd. *The terms*, "that any tax, which shall hereafter be levied, shall not exceed," &c., have no reference to taxes or assessments on levies for county purposes; it relates, exclusively, to taxes laid for State purposes.
- 4th. The powers, &c., exemptions conferred by the act of 1835, ch. 293, as to county taxes, relate to *Cecil* county.
- 5th. A tax laid by the commissioners of *Harford* county, for county purposes, on the rails, bed of the rail road, and other property of the company, connected with its road in *Harford* county, and not upon the cars of said *Company*, was not forbidden by the charters referred to, and is within the general law relating to taxes. *The P. W. & B. Rail Road Co. vs. Bayless*, 355.

REFERENCE. See ARBITRATION.

RELATION. See LAND OFFICE, 2, for, of Patent to Survey.

REMAINDER—VESTED AND CONTINGENT.

See MAXIMS, 3.

WILL AND TESTAMENT, 3 to 9.

REPLEVIN.

1. *D* sued out a writ of *replevin*, and gave the usual bond, with the other defendants as his sureties, to *J*; at the trial of the *replevin*, the defendant *J* pleaded *non cepit*, and property in *S*; and the plaintiff, *D*, pleaded property in himself. The issues were found for *J*, with a judgment for a return of property. In an action on the *replevin* bond entered for the use of *S*, the defendants, *D* and his sureties, were

REPLEVIN—*Continued.*

permitted to prove in mitigation of damages, that the property really belonged to *S*, that *J* had no personal interest in it; and maintain, that he could recover in this action only the amount of damage sustained by him, personally, in consequence of the property being taken from his possession, and could not increase the damages to the extent of *S*'s right, by showing that he was her agent. *Walter, use of Walter vs. Warfield et al*, 216.

2. The damages which an obligee in a replevin bond can recover from the obligors, are only such as he has suffered personally, by reason of the institution and failure of the action of replevin. *Ib.*

REPURCHASE. *See* ASSUMPSIT, 1.

REVERSION. *See* RIPARIAN PROPRIETOR.

RIPARIAN PROPRIETOR.

1. The tenant in fee of a lot binding on the basin of the city of *Baltimore*, leased the same for a term of years, reserving a right to distrain and re-enter; and granted his lessee "the exclusive right of extending, not exceeding, &c., into the water, any and every part of said lot which fronted the basin, provided he could obtain permission for that purpose, from the *Mayor &c. of Baltimore*, or the legislature of the *State*. The reversion of this lot was sold to *O*, who recovered the leased premises by ejectment for non-payment of rent, and applied to the corporation of *B* for liberty to extend the lot into the basin, according to the original lease, which was granted, and the extension made. **HELD:**

1st. That the right to make the improvement, and it, when made, did not remain in the heirs of the first tenant in fee, who leased it.

2nd. By the sale of the reversion to *O*, all the right of the original tenant in fee, both in the lot, and the permission to extend the same, as granted by the lease, vested in *O*.

3rd. By the forfeiture of the lease, consequent upon the recovery in ejectment, no right reverted to the first tenant.

4th. That if the lessee had made the improvement under the permission granted by his lease, the lessor and his assigns could have distrained or re-entered upon it, as upon the original lot.
The City of Baltimore vs. White, 444.

2. The permission granted by the *Mayor and City Council of Baltimore*, to extend an improvement into the water, to an owner of a lot adjacent thereto, is not within our registration system. *Ib.*
3. The law imputes to a purchaser knowledge of all facts, appearing at the time of his purchase upon the paper or record evidence of title, which it was necessary for him to inspect to ascertain its sufficiency. *Ib.*
4. So the purchaser of a wharf in the city of *Baltimore*, erected under the authority of the acts of 1745, 1783, and 1796, though *bona fide*, is affected with notice of the permission granted to build it, and bound by it. *Ib.*

RIPARIAN PROPRIETOR—*Continued.*

5. Where an ordinance was passed, granting permission to build a wharf which required the written assent of the applicant for such permission, and it appeared that he erected the wharf, the law will presume such written assent, and the grantor, and his subsequent assignees, will be estopped from denying such assent. *Ib.*
6. The means by which a wharf is erected, under the act of 1745, in the city of *Baltimore*, and appropriated to the public use, form a part of the paper title, the record evidence, which must be resorted to, and examined, to trace the right to such property; no patent issues, but the title must conform to the acts of 1745, ch. 9; 1783, ch. 24; 1796, ch. 68; and the ordinances of that city. *Ib.*
7. Under the acts of 1783 and 1796, *the Mayor and City Council of Baltimore* may refuse their assent to the erection of a wharf, or may grant it, with such conditions, limitations and restrictions, as they may deem most beneficial to the navigation, and use of the port, of that city. *Ib.*
8. Such a grant upon condition, that its exterior margin shall constitute a public wharf, is valid. Its dedication to the public use, when erected, may be required. *Ib.*

See WHARFAGE AND WHARVES, 1, 2, 3, 4.

RULES OF COURT.

See PRACTICE, 22, 23, 24.

SALES OF GOODS, &c.

See ASSUMPSIT.

SHIPS AND SHIPPING.

SALES OF REAL PROPERTY UNDER DECREE.

See PRACTICE IN CHANCERY, 9, 10, 11, 12, 13.

SHERIFF, 3, 4, 5, 6, 7.

SALVAGE. See INSURANCE.

SHERIFF.

1. A sale of land made by a sheriff, under execution, to his own agent, is not necessarily void at law. It is voidable for fraud in fact. *Isaac and wife's lessee vs. Clarke*, 1.
2. A sheriff who has made a levy upon personal property, under a writ of *fieri facias*, in good faith apprehending danger of loss by reason of the conflicting claims made upon it, is entitled to have the title of the claimant settled in equity, and be protected in the mean while by injunction. *Ridenour et al. vs. Keller*, 134.
3. If the sheriff give time to a purchaser at his sale, to pay the purchase money, without the assent of the creditor, the latter is not bound by it. *Hardesty vs. Wilson*, 481.
4. In a proceeding in equity where the sheriff is no party, the conduct of that officer cannot be inquired into. *Ib.*
5. It does not follow, that because a bidder is found upon an offer for sale of property, levied on under a *fi. fa.*, and he makes the highest bid, that the supposed sale to him discharges so much of the debt. *Ib.*

SHERIFF—*Continued.*

6. The bidder acquires no title to the thing purchased, but by payment of the purchase money, and if he fails to do this within a reasonable time, a re-sale may be lawfully made. *Ib.*
7. The seizure, upon a *fi. fa.*, is not a satisfaction of the debt. *Ib.*

See EXECUTION.

BOND OF SHERIFF.

SHIPS AND SHIPPING.

1. Underwriters are liable for a loss, the *proximate* cause of which, is one of the risks enumerated in their policy, though the *remote* cause may be traced to the negligence of the master and mariners. *Georgia Ins. & Trust Co. vs. Dawson*, 365.
2. The liability of the ship owner to the shipper for the negligence of the master and crew, cannot avail the insurer as a defence. Upon payment of the damage, the insurer may be subrogated to all the rights of the insured against the person answerable for bad stowage and dunnage. *Ib.*
3. On the 6th October 1841, *B* executed an absolute bill of sale to *M*, for a vessel, on which, on the 8th he took out a register in his own name, and made the usual oath required by the act of *Congress*. On the 15th November 1841, *B*, who continued in possession, chartered the vessel for a foreign voyage, to *H*, who appointed *C* master, and he, in November, and to the 15th December, purchased materials for her outfit, by *B*'s directions. On the 20th, the account for materials was delivered to *B*. On the 19th January 1842, the charter party made by *B*, was assigned and delivered by him to *M*, who then effected insurance on the vessel and freight, after an enquiry of *B*, of the nature and particulars of the voyage. Upon the return of the vessel, in August 1842, *M* received the freight, paid the port charges, for the first time took possession of her; in November sold her, and received the money; never having before had any possession and control of the vessel. In an action brought by a material man against *M*, for the supplies furnished as aforesaid, HELD :
 - 1st. That the plaintiffs were not entitled to recover, upon the mere finding of the fact by the jury, that *M* was the owner of the vessel, at the time the articles furnished her, were sold and delivered. Nor in addition to the fact of ownership, as aforesaid, the circumstances, that the supplies were furnished, and that *M* received the benefit of them. *Henderson vs. Mayhew*, 393.
 - 2nd. That it was not competent for *M* to show, by parol proof, that his bill of sale was intended to be a mortgage; that it was so designed and agreed, between him and *B*. *Ib.*
 - 3rd. It was not competent, to either plaintiff or defendant, under the circumstances of this case, by any form of prayer, to withdraw the question of *B*'s agency for *M*, in procuring materials for the ship, from the consideration of the jury. *Ib.*
4. Where there was evidence offered, that *M* was the owner of a vessel at the time she was furnished with supplies, but the account against

SHIPS AND SHIPPING—*Continued.*

her and her owner, was sent to *B.*, her previous owner, for payment, this cannot discharge *M.*, if, but for this proof, he would have been answerable. *Ib.*

5. A charter party granted and let on freight, the whole tonnage of a vessel, for a voyage from *M. V.* to *C. C.*, and thence to *B.* When the lading at *C. C.* was completed, she was to depart and proceed to *B.*, where the cargo was to be discharged, and thus end the voyage. In consideration of which, the charterer agreed to pay the owners a gross sum, "payable on the right delivery of the cargo at *B.*" The vessel received cargo at *M. V.*; proceeded to *C. C.*; where a part was landed, and a part of the cargo, destined to *B.*, shipped. At this time she was forcibly taken possession of by a ship of war, and carried back, by force, to *M. V.*; where she was, after some delay, restored to her master. Under such circumstances, the charter party did not impose an obligation on the charterer to pay the whole freight at *M. V.*, as if the vessel had proceeded to *B.* The intent of the charter was, that a full and complete cargo should be received at *C.* and delivered at *B.*, to entitle the owner to full freight; the charterer being in no default. *Charleston Ins. & Trust Co. vs. Corner*, 410.

SPECIAL WARRANT. *See* LAND OFFICE.

SPECIFIC PERFORMANCE.

1. A defendant cannot exempt himself from the obligation to make a conveyance which he stipulated to make, on the ground that he has not the legal title. *Jones vs. Belt*, 106.
2. A vendee, against whom a decree for specific performance of a contract of purchase is sought, may object to the want of title in his vendor, as insuperable in ordinary cases. *Ib.*
3. Ordinarily Chancery will not compel a purchaser to pay the purchase money and accept a defective title. But a vendor has no interest in setting up his own want of title. *Ib.*

SUBROGATION.

See VENDOR AND VENDEE, 2, 3, 4, 5.

INSURANCE, 3.

TAXES.

1. By the act of 1831, ch. 288, the *Baltimore and Port Deposit R. R. Co.* was chartered, to construct a rail road from *B.* to *P. D.* By the act of same year, ch. 296, the *Delaware and Maryland R. R. Co.* was also chartered, to construct a road from some point at the *Delaware and Maryland* line to *P. D.* By the act of 1835, ch. 293, the *D. and M. Co.*, was united to the *Wilmington and Susquehanna R. R. Co.*, a company chartered by *Delaware* under that name. By the act of 1837, ch. 30, the first named company was united with the *W. & S. R. R. Co.*, under the name of the *Philadelphia, Wilmington and Baltimore R. R. Co.* The first named company was located in *Baltimore* and *Harford* counties; and as to the second,

TAXES—*Continued.*

which lies in *Cecil* county, *Maryland*, "the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden by the State, except that portion of the permanent and fixed works of the company, within the State of *Maryland*, and that any tax which shall hereafter be levied upon said section, shall not exceed the rate of any general tax, which may, at the same time, be imposed upon similar real and personal estate, within this *State*, for *State* purposes." **Held:**

- 1st. That the shares and stock of the *D. & M. R. R. Co.*, its works, improvements, profits, and machinery of transportation, except, &c., were exempted from all taxation or levies, whether for county or State purposes.
- 2nd. The permanent and fixed works of the *Company* remained subjects of taxation or assessment, either for county or State purposes, or for both, by virtue of the said exception.
- 3rd. *The terms*, "that any tax, which shall hereafter be levied, shall not exceed," &c., have no reference to taxes or assessments on levies for county purposes; it relates, exclusively, to taxes laid for State purposes.
- 4th. The powers, &c., exemptions conferred by the act of 1835, ch. 293, as to county taxes, relate to *Cecil* county.
- 5th. A tax laid by the commissioners of *Harford* county, for county purposes, on the rails, bed of the rail road, and other property of the company, connected with its road in *Harford* county, and not upon the cars of said *Company*, was not forbidden by the charters referred to, and is within the general law relating to taxes. *P. W. & B. Rail Road Co. vs. Bayless*, 355.
2. By the act of 1st April 1841, ch. 23, imposing a direct tax of twenty cents in the hundred dollars, it was designed, that such tax should be paid into the treasury, and the collector's commissions, by the counties or cities respectively making the levy, by an additional levy, and not by the treasury. *Seidenstricker vs. State*, 374.
3. The act of March session 1841, ch. 23, provided for a general assessment of all the real and personal property within this State, and directed, that the capital stock of the several banks, and other incorporated institutions of the State, should be assessed to its owners at its cash value, and taxed at one-fourth of one per centum. *State vs. Mayhew*, 487.
4. All the property of such banks, &c., the stock of which was thus assessed and taxed, being exempted from taxation, the taxation of such stock is constitutional. *Ib.*
5. To relieve the proprietors of such stock, and facilitate the collection of the tax thus imposed, the act of 1843, ch. 289, made it the duty of the president, (or other proper officer) of such corporations, semi-annually, to set apart, and withhold out of the dividends, or profits, the amount of the tax levied on such stocks, and pay the same to the treasurer of the State. *Ib.*

TAXES—*Continued.*

6. The act of 1843, is a legitimate exercise of power, incident to the sovereign right of levying taxes for the support of government. *Ib.*
7. By the act of 1843, the place and mode of levying and collecting such tax are changed; it was no longer collectable where the stockholders resided; it ceased to be a debt or duty chargeable on them: they were exonerated from all personal liability for its payment: the stock, itself, stood exempt from its payment, and the security of the State therefor, became contingent. *Ib.*
8. For the recovery of such tax, the State has no lien on the stock; can maintain no action at law, either against the stockholder, bank, or any officer of the bank in his official character; nor an action for money, had and received against any such officer, in his individual capacity. *Ib.*
9. But the State has a legal right to be paid out of the dividends declared, or profits made, the amount of the tax on the assessed value of such stock, and for the assertion of such right, having no appropriate legal remedy, is entitled to the writ of *mandamus* against the president or other proper officer of any such corporation. *Ib.*
10. The president of a bank, &c., is not, by the nature of the duty imposed upon him, by the act of 1843, created a State officer, a collector of the taxes due by the stockholders of the bank. *Ib.*
11. The object of the act was to command such president, he being already in possession thereof, to pay to the treasurer of the State the amount of State taxes in his hands, which, under the act of 1843, he had no authority to pay to any other person. *Ib.*
12. The General Assembly has the right, by legislation, to impose upon all property within the State, a just and proportionately equal public tax; to provide all means, details necessary for its speedy collection, by summary process of execution, or other reasonable or available means. *Ib.*
13. A power exercised by the General Assembly, from the adoption of our Constitution till the present time, a period of nearly seventy years, ought to be deemed almost conclusive evidence of its possession by that body. *Ib.*
14. A cotemporaneous construction of the constitution of such duration, continually practised under, and through which, many rights have been acquired, ought not to be shaken, but upon the ground of manifest error and cogent necessity. *Ib.*
15. Where the law provided for the valuation of bank stock, and it had been valued accordingly, and an act of Assembly prescribed the rate of taxation, and directed who should pay it, it cannot be said that the tax on such stock has not been levied: it is a legislative levy, wholly irrespective of the ownership of the stock. *Ib.*
16. As soon as a dividend is declared, the right of the State to so much of it as is required to be paid on account of the stock taxed, is fixed and indefeasible, and over-rides all other liens, claims or rights, by whomsoever asserted, unless, perhaps, it were in conflict with a preferred claim of the *United States*. *Ib.*

TAXES—*Continued.*

17. A citizen is not necessarily discharged from the obligation to perform a duty enjoined by law, for the public good, because it imposes on him some additional labor, trouble and expense; as to perform militia duty, vote at the election of public officers, furnish true statements to assessors, obey the summons of executive officers, or arrest felons: in these, and other instances, the citizen must obey the law. *Ib.*

See COLLECTORS OF COUNTY LEVIES AND TAXES.

CONSTITUTIONAL LAW, 1, 2.

TENANT BY THE CURTESY. See DOWER.

TIME. See EXECUTOR AND ADMINISTRATOR, 4.

TRESPASS—TRESPASSER.

See ACTION ON THE CASE 5. as to, *ab initio*.

PRACTICE, 20, 21.

TRUSTS—TRUSTEES.

1. On the 1st February 1820, *B.* being in debt on judgment, executed a mortgage of his lands to *C.* to secure him a sum due on bond. On the 29th of the same month, he executed a *second* mortgage of his lands and personal property to *W* and *M*, who were his sureties; and for their indemnity. On the 27th July following he executed a *deed of trust* for the property mentioned in the second mortgage, to the same grantees. The trust was to sell the property, as speedily as it could be done without a sacrifice, and pay 1st, all liens and incumbrances according to their priority; and 2nd, all judgments obtained against, debts or liabilities undertaken by, *W* and *M* for the said *B.* The personal property, which was under execution, was sold and so applied. The land was not sold until October 1821. **HELD:**

1st. That as the trustees were not obliged to sell at a sacrifice, by the terms of the deed; the depressed price of lands furnished a sufficient justification to them for forbearing the sale for the time they did forbear.

2nd. That at the sale of the land, which was by virtue of an execution, the purchaser was, in fact, an agent of one of the trustees.

3rd. A trustee who purchases the trust property, which had been previously levied on, at the sheriff's sale under the writ, being guilty of no fraudulent conduct to depress the price, will be entitled to re-imbursement of his expenditures, but cannot deprive the *c. q. t.* of the benefit of his purchase.

4th. The circumstance of the trustee having an interest coupled with his trust, as for the satisfaction of his own claims, does not dispense with the equity, that all his acts should enure in equal proportions to the benefit of others according to the extent of their claims, as well as to himself. *Bell et. al. vs. Webb and Mong*, 163.

TRUSTS—TRUSTEES—*Continued.*

2. Where a *c. q. t.* attended the sale of trust property, under an execution, by a judgment creditor of the grantor of the fund, was requested to bid, and did not; nor did he express any dissatisfaction therewith, but it did not appear that, he then, or at any subsequent time until the filing of his bill, had any notice or knowledge, that his trustee, through an agent, was the purchaser, there is no ground to impute acquiescence in the sale, though eighteen years had elapsed. *Ib.*
3. In such a case, the sale is voidable at the election of the *c. q. t.* The land remaining in the possession of the trustee, at the institution of the suit, may be sold, and the purchase money, after allowing the trustee all the money by him paid and applied to the purposes of the trust, and also for all necessary and proper expenditures upon the land, and permanent improvements thereon, over and above its profits, shall be applied to the purposes of the trust. *Ib.*
4. It is the duty of a trustee, acting under a decree for a sale, as soon as an order has passed distributing the proceeds thereof, and he has received the same, either to pay over the fund to the party directed to be paid, or carry the same into court. *Richardson vs. the State, use of Rawlings*, 439.
5. For money detained against such duty, the jury may give interest, by way of damages. *Ib.*

See PRACTICE IN CHANCERY, 9 to 13. Sales by trustees under decree.

USE AND OCCUPATION. See ASSUMPSIT, 1.

VARIATION OF THE COMPASS.

See EVIDENCE, 51.

EJECTMENT, 14.

VENDOR AND VENDEE.

1. *P* sold a tract of land to *T* for \$8000; of which, \$1000 was secured by the vendee's notes; \$2000, due in 1841 and 1842, secured by the vendee's notes with *W*, as endorser; and the balance of \$5000, due from 1843 to 1847, secured by the vendee's notes with *D* and *S* as endorsers. The vendee died insolvent. The vendor recovered judgment, at law, against *W*, and then proceeded in equity to sell the land, which he purchased in at \$4000. Upon a bill, filed by *W* to compel *P* to apply the \$4000 in discharge of the notes first due, and to restrain his proceedings at law upon his judgments, HELD: that the product of the sale should be so applied, under the direction of the Court of Chancery, as would give full security to the vendor, which might be done by enquiring into the pecuniary condition of the sureties. *Welch vs. Parran et al.* 320.
2. If any one of the sureties should be found unable to pay, then the vendor should be secured by applying so much of the proceeds of sale, as would extinguish the note thus endangered. *Ib.*
3. The vendor is entitled to full payment from the one security or the other; or if one is insufficient, from the additional security. The endorsed notes are to be considered as additional securities. *Ib.*

VENDOR AND VENDEE—*Continued.*

4. The vendor is not bound to wait, during the time occupied in ascertaining the condition of the securities, but as the notes become due may enforce them at law. *Ib.*
5. Such of the sureties as pay, may be subrogated to the rights of the vendor, to the extent of any interest they may have in the purchase money. *Ib.*

See SPECIFIC PERFORMANCE.

CONTRACT, 1.

PURCHASER, 1.

VOID—VOIDABLE.

1. *M.* and *L.* rented a farm from *Z.*, and agreed to give him one half of all the grain raised on it as a rent for the same, and on the 8th May 1841, they executed a bill of sale to him for a variety of chattels, and also for all their "portion of grain now growing on his, the said *Z.*'s farm, and all that should be sown or planted, each succeeding year." This instrument was not proved to have been recorded under the act of 1729; and contained a warranty of title by the grantors, and a declaration of a delivery of part of the goods, &c., for the whole. In the fall of 1841, *M.* and *L.* sowed a crop of wheat; and on the 23rd February 1842, agreed with *Z.* that he should offer the grain in the ground for sale for his own use, and credit them with its proceeds. No sale having in fact been made, *E.* and *B.*, judgment creditors of *M.* and *L.*, who were still in the occupancy of the land, on the 26th February 1842, levied a *fieri facias* on the growing grain as the property of *M.* and *L.*; and sold the same on the 9th March, under the writ. The purchaser agreed with *E.* and *B.* that his liability should depend on the question whether the crop belonged, of right, to *M.* and *L.* It appeared *B.* had a knowledge of the bill of sale of May 1841, but not until after the grantors thereof became indebted to *E.* and *B.*, though before they issued their writ of *fi. fa.* In an action by *E.* and *B.*, against the purchaser of the grain, to recover the price thereof, the County court refused to instruct the jury upon the prayer of the defendant, that the bill of sale though invalid as a grant, yet, as a covenant between the parties, was effectual, and would entitle *Z.* to hold the grain, if the jury should believe that he had paid the consideration mentioned therein, and the plaintiffs had notice of its existence anterior to issuing their writs, and *Z.* had permission before their issue to sell the grain for his own use. Upon appeal by the defendant, the exception to such refusal was abandoned. *Byer vs. Etnyre and Besore*, 150.

See CONTRACT, 5.

FRAUD, 1.

SHERIFF, 1.

TRUSTS—TRUSTEES, 1, 2, 3.

WARRANT OF SURVEY. See LAND OFFICE.

WATER COURSES.

1. As to diversion of. *Addison vs. Hack*, 221.

WHARFAGE AND WHARVES IN THE CITY OF BALTIMORE.

1. Under the acts of 1783 and 1796, *the Mayor and City Council of Baltimore* may refuse their assent to the erection of a wharf, or may grant it, with such conditions, limitations and restrictions, as they may deem most beneficial to the navigation, and use of the port, of that city. *City of Baltimore vs. White*, 444.
2. Such a grant upon condition, that its exterior margin shall constitute a public wharf, is valid. Its dedication to the public use, when erected, may be required. *Ib.*
3. The collection of wharfage upon a public wharf, is a fit subject for State legislation. *Ib.*
4. The act of 1827, ch. 162, sec. 4, gives the *M. and C. C of Baltimore* the right to charge and collect wharfage from public wharves, and where the owner of a lot adjacent to such a wharf, demands and receives the wharfage, the city may recover the amount unlawfully received, and withheld from her, by such owner. *Ib.*

See RIPARIAN PROPRIETOR.

WILL AND TESTAMENT.

1. Where a testator devised all the rest, residue and remainder of his estate unto all the children of his sister and his late brother, that are now in existence, to be equally divided amongst them *per capita*, share and share alike, one of his nieces alive at the date of the will, married, and died before the testator. The sister and late brother had each five children alive at the date of the will. HELD: that the surviving husband of the deceased niece, was entitled to one-tenth of the testator's personal estate in the hands of his executor. *Aldridge, ex'r of Higdon vs. Boswell*, 37.
2. The orphans court may receive evidence of an error in the date of a will offered for probat. *Hannon et. al. vs. the State, use of Robey and wife*, 42.
3. M, by his last will, devised to one of his three sisters, certain real estate in fee, and constituted her his residuary legatee, and devisee; he bequeathed to her all his "money, choses in action, and all the rest, residue, and remainder of my (his) property, real, personal and mixed, (not hitherto devised or bequeathed,) of which I am now possessed, or of which I may be possessed, at the time of my death, to her, her heirs and assigns, forever." M also devised real and personal estate, in trust, for his other two sisters. After the publication of this will, the testator purchased other real estate, and died without republishing it. HELD, that the two sisters, who took trust estates, could not also claim as heirs at law, their proportion of the after acquired estate; which, in this case the testator intended to pass under the residuary clause. *McElfresh adm'r vs. Schley and Barr*, 181.
4. On the 6th August 1837, J, by his last will, devised his sister S an annuity, to be paid by his executrix, and charged the same on the whole of his real estate. After a devise of a farm to his wife, for her life, he bequeathed the same "unto the eldest male heir of the body of his brother H, and the heirs and assigns of such male heir, if he

WILL AND TESTAMENT—*Continued.*

shall live to attain the age of twenty-one years;” and for want of such male heir, then the same estate should descend to the right heirs of the testator. The testator died in 1837; left no children, but a widow, (the devisee for life,) who died in 1841, a sister *S*, of the whole blood, and his brother *H*, of the half blood, *still alive*, who has a son, his eldest male child, born in 1838. **HELD:** that upon the death of the tenant for life, in 1841, living *H*, the estate descended to the right heirs of the testator, his sister *S*, the complainant in the bill. *Mitchell vs. Mitchell*, 230.

5. One cannot take, as *purchaser*, under the description of *heir*, or *heir male*; unless, when the estate is to vest, he has, by the death of his ancestor, become very heir. *Ib.*
6. This is the general rule, subject only to this exception, that when the intention of the testator can be made clearly to appear from the will, that he did not mean the words, heir or heir male, to be used in their technical sense, then the popular sense shall prevail. *Ib.*
7. *Prima facie*, the word *heir* must be taken in its technical sense, as a word of limitation. *Ib.*
8. Every contingent remainder must vest *eo instanti*, that the particular estate determines. *Ib.*
9. There are certain principles to be kept in view, when a court is called upon to construe a will: one is, and the most material, that the leaning should be towards technical words in their technical sense; and only suffering themselves to adopt another meaning, when there can be no reasonable doubt, from the context, that in such sense the testator used them; and that he could not have used them in their known and legal sense. *Ib.*
10. Where a will devising real property authorized its sale upon the consent of the testator's widow, her consent, to a decree for the sale, is a sufficient compliance with the requisition of the will. *Tyson vs. Mickle et al.*, 376.

See DOWER.

ELECTION IN EQUITY, 1 to 8.

EXECUTOR AND ADMINISTRATOR, 4.

WORK AND LABOR, *See* ASSUMPSIT, 5, 6.

WRIT. *See* PRACTICE, 25, 26.



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